No. 093

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No. 15502

United States
Court of Appeals
for the Ninth Circuit

MOE WEISE and JAMES LESTER FRENCH,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Western District of Washington, Southern Division.

No. 15502

United States
Court of Appeals
for the Ninth Circuit

MOE WEISE and JAMES LESTER FRENCH,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Western District of Washington, Southern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif. — 9-13-57

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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ROBERT M. ELIAS,
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Seattle, Washington,

Attorney for Defendants.

United States District Court, Western District of Washington, Northern Division

No. 16464

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MOE WEISE, Alias MOE WEISS, Alias MATT WEESE, and JAMES LESTER FRENCH,

Defendants.

INDICTMENT

The Grand Jury charges:

Count 1.

That on or about March 17, 1956, Moe Weise, alias Moe Weiss, alias Matt Weese, and James Lester French, did knowingly transport in interstate commerce from Portland, Oregon, to Tacoma in the Southern Division of the Western District of Washington, for the purpose of sale and distribution, obscene and lewd and lascivious and filthy books and pamphlets and pictures and films and prints and images, to wit: approximately sixty-two thousand four hundred and fourteen (62,414) photo prints measuring 4x5 inches; approximately seventy-one (71) rubber images of the human penis; one (1) book titled "Burnt Fingers"; five (5) books titled "Twin Torment"; one (1) book titled "Nights of Horror"; five (5) books titled "Education in Sub-

mission"; five (5) books titled "Mistress of Leather."

All in violation of Title 18, U.S.C., Section 1465.

Count II.

That on or about March 17, 1956, Moe Weise, alias Moe Weiss, alias Matt Weese, and James Lester French did knowingly transport in interstate commerce from Portland, Oregon, to Tacoma in the Southern Division of the Western District of Washington, for the purpose of sale and distribution, obscene and lewd and lascivious and filthy pictures and films and prints, to wit: approximately twenty-five (25) reels of motion picture film.

All in violation of Title 18, U.S.C., Section 1465.

A True Bill.

/s/ NORMAN H. KELLEY,
Foreman.

/s/ CHARLES P. MORIARTY,
United States Attorney;

/s/ EDWARD J. McCORMICK, JR.,
Assistant United States
Attorney.

[Endorsed]: Filed May 14, 1956.

[Title of District Court and Cause.]

DEFENDANT'S MOTION TO SUPPRESS THE EVIDENCE

Comes Now the defendants, Moe Weise and James Lester French, in the above-entitled court, by and through their attorney, Robert M. Elias, and move this honorable court to suppress the evidence seized by the Federal Government and enumerated in Counts I and II of the Indictment herein, and that it be excluded upon the trial of this action. Under Rule 41(e) Federal Rules of Criminal Procedure.

This Motion is based upon the files and records of this cause and upon the affidavit of Robert M. Elias, attorney for the defendants herein.

/s/ ROBERT M. ELIAS,
Attorney for Defendants.

AFFIDAVIT

State of Washington,
County of King—ss.

Robert M. Elias, being first duly sworn upon oath deposes and says:

That he is the attorney for the defendants in the cause herein and that he makes this affidavit in support of the Motion to Suppress, for and on behalf of said defendants. That most of the alleged facts herein were obtained at the preliminary hear-

ing on or about March 19, 1956, before United States Commissioner John Burns at Seattle, Washington.

That Moe Weise and James Lester French left Los Angeles for Seattle on or about March 15, 1956. That the only purpose of James Lester French going in the same car with Moe Weise was for transportation.

That the defendants and the automobile of Weise were under surveillance by the members of the Federal Bureau of Investigation from the time they left Los Angeles until the alleged arrest by warrant at approximately 11:15 p.m. Saturday, March 17, 1956. That at various times the defendants were out of sight of the Federal Bureau of Investigation agents, and that at Portland, Oregon, the defendants were out of sight of the agents, and further that no agent saw the defendants cross the Oregon-Washington line.

That at no time did any of the F.B.I. Agents have any knowledge of what was in the car occupied by the defendants from the time they left Los Angeles, California, on or about Thursday, March 15, 1956, until the alleged arrest on Saturday, March 17, 1956.

That the warrant that was issued on Saturday, March 17, 1956, at about 10:10 p.m. was sworn to by F.B.I. Agent Charles N. Hiner, who had no personal knowledge of the information sworn to except by hearsay from a radio report. That the only knowledge of any type which Charles N. Hiner had was hearsay evidence only.

That the rights of the defendants under the 4th and 5th Amendments were violated by the action of the F.B.I. and their agent.

That the warrant was illegally obtained by use of hearsay evidence.

That there was not probable cause for believing the existence of the grounds in which the warrant was issued.

That the warrant was illegally executed.

That therefore the Motion to Suppress should be granted.

/s/ ROBERT M. ELIAS.

Duly verified.

[Endorsed]: Filed January 14, 1957.

[Title of District Court and Cause.]

WAIVER OF JURY

We and each of us do hereby waive the right to trial by jury as required under F.R.C.P. No. 23, this 5th day of February, 1957.

/s/ MOE WEISE,

/s/ JAMES LESTER FRENCH.

Approved:

/s/ ROBERT M. ELIAS,
Atty. for Defendant,

/s/ EDWARD J. McCORMICK, JR.,
Assistant U.S. Dist. Attorney;

/s/ GEO. H. BOLDT,
Judge.

[Endorsed]: Filed February 5, 1957.

United States District Court for the Western District of Washington, Southern Division

No. 16464

UNITED STATES OF AMERICA,

vs.

JAMES LESTER FRENCH,

Defendant.

JUDGMENT AND COMMITMENT

On this 6th day of February, 1957, came the attorney for the government and the defendant appeared in person and by Robert M. Elias, his attorney, and the court having heretofore directed that no presentence investigation be made.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty of the offense of 18 U.S.C. 1465 (Interstate Transportation of Obscene Material), as charged in Counts I and II of the Indictment; and the defendant having waived trial by jury, and having requested trial upon said charge to the court without a jury, and the said cause having come on regularly for trial before the

Court without a jury on February 5, 1957, and evidence having been offered by each of the parties and each of the parties having rested; and the Court having heard argument of defendant's counsel, and the Court having fully considered the matter and being fully advised, Now Finds the defendant guilty of the charges contained in Counts I and II of the Indictment; and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Two (2) Years, with a fine of Twenty-five Hundred ($2,500.00) Dollars on Count I; and Two (2) Years, with a fine of Twenty-five Hundred ($2,500.00) Dollars on Count II; the sentence as to confinement to be concurrent and the fines to be non-cumulative; that is to say, a total imprisonment of Two (2) Years and a total fine of $2,500.00, the defendant to stand committed until the fine adjudged against him shall have been paid.

It Is Further Ordered, Adjudged and Decreed that plaintiff's Exhibits 1 to 57 be turned over to the Federal Bureau of Investigation for addition of such portions as may be required, to the Federal

Bureau of Investigation Laboratory, Obscene Material Section, and for destruction of the remaining portion not so required.

[Received these exhibits 2/6/56. Joseph A. Ciminera, Special Agent, F.B.I., Seattle.]

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ GEORGE H. BOLDT,
United States District Judge.

Presented by:

/s/ EDWARD J. McCORMICK, JR.,
Assistant United States
Attorney.

[Endorsed]: Filed February 6, 1957.

United States District Court for the Western District of Washington, Southern Division

No. 16464

UNITED STATES OF AMERICA,

vs.

MOE WEISE,

Defendant.

JUDGMENT AND COMMITMENT

On this 6th day of February, 1957, came the attorney for the government and the defendant ap-

peared in person and by Robert M. Elias, his attorney, and the Court having directed that no presentence investigation be made,

It Is Adjudged that the defendant has been convicted upon his plea of not guilty to the charges contained in Counts I and II of the Indictment of the offense of Title 18, Section 1465 (Interstate Transportation of Obscene Material); and the defendant having waived trial by jury, and having requested trial upon said charge to the court without a jury, and the said cause having come on regularly for trial before the Court without a jury on February 5, 1957, and evidence having been offered by each of the parties and each of the parties having rested; and the Court having heard argument of defendant's counsel, and the Court having fully considered the matter and being fully advised, Now Finds the defendant guilty of the charges contained in Counts I and II of the Indictment, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Four (4) Years, with a fine of Five Thousand ($5,000.00) on Count I; and Four (4)

Years, with a fine of Five Thousand ($5,000.00) on Count II; the sentence as to confinement to be concurrent and the fines to be non-cumulative; that is to say a total imprisonment of Four (4) Years and a total fine of $5,000.00, the defendant to stand committed until the fine adjudged against him shall have been paid.

It Is Further Ordered, Adjudged and Decreed that the plaintiff's Exhibits 1 to 57 be turned over to the Federal Bureau of Investigation for addition of such portions as may be required to the Federal Bureau of Investigation Laboratory, Obscene Material Section, and for destruction of the remaining portion not so required.

[Received these exhibits 2/6/56. Joseph A. Cimmera, Special Agent, F.B.I., Seattle.]

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ GEORGE H. BOLDT,
United States District Judge.

Presented by:

/s/ EDWARD J. McCORMICK, JR.,
Assistant United States
Attorney.

[Endorsed]: Filed February 6, 1957.

[Title of District Court and Cause.]

BOND ON APPEAL

Know All Men by These Presents:

That we, Moe Weise, as principal, and Michigan Surety Company, a corporation organized and existing under the laws of Michigan, as Surety, and doing business in the State of Washington and by virtue of the laws of the State of Washington, are held and firmly bound unto the United States of America, in the sum of Ten Thousand Dollars ($10,000.00) to be paid to the said United States of America, certain attorney, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated the 6th day of February, in the year of our Lord One Thousand Nine Hundred and Fifty-seven.

The Condition of the above recognizance is such, that, whereas, lately at a District Court of the United States for the Western District of Washington in a suit pending in said Court, between the United States of America vs. Moe Weise, No. 16464, a judgment was rendered against the said Moe Weise and the said Moe Weise having filed in the Clerk's Office of said Court Notice of Appeal in duplicate, from said judgment in the aforesaid suit, the said appeal is now regularly pending in the

United States Court of Appeals in and for the Ninth Circuit Court, to be holden at the City of San Francisco in the State of California and Northern District of California.

Now, Therefore, if the said Moe Weise surrender himself in execution of the judgment, upon its being affirmed or modified, or upon the appeal being dismissed, or that in case of the judgment be reversed and the cause be reversed and the cause be remanded for a new trial he appear in the Court to which said cause may be remanded for a new trial and render himself amenable to any and lawful orders and process in the premises, then this recognizance shall be void, otherwise to remain in full effect and virtue. This recognizance shall be deemed and construed to contain the "express agreement" for summary judgment, and execution thereon, mentioned in Rule 34 of the District Court. As a further condition the defendant is prohibited from leaving the jurisdiction of this Court without authorization of the United States District Judge.

/s/ MOE WEISE.

MICHIGAN SURETY COMPANY,

By /s/ WILLIAM G. HIMELHOCH,
Attorney in Fact.

Approved:

/s/ GEORGE H. BOLDT,
United States District Judge

Acknowledged before me and approved the day and year first above written.

/s/ EDWARD J. McCORMICK, JR.,
Asst. United States Attorney for the Western District of Washington.

[Endorsed]: Filed February 6, 1957.

[Title of District Court and Cause.]

BOND ON APPEAL

Know All Men by These Presents:

That we, James Lester French, as principal, and Michigan Surety Company, a corporation organized and existing under the laws of Michigan, as Surety, and doing business in the State of Washington and by virtue of the laws of the State of Washington, are held and firmly bound unto the United States of America, in the sum of Five Thousand Dollars ($5,000.00) to be paid to the said United States of America, certain attorney, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated the 6th day of February, in the year of our Lord One Thousand Nine Hundred and Fifty-seven.

The Condition of the above recognizance is such, that, whereas, lately at a District Court of the United States for the Western District of Washington in a suit pending in said Court, between

United States of America vs. James Lester French, No. 16464, a judgment was rendered against the said James Lester French and the said James Lester French having filed in the Clerk's Office of said Court Notice of Appeal in duplicate, from said judgment in the aforesaid suit, and said appeal is now regularly pending in the United States Court of Appeals in and for the Ninth Circuit Court, to be holden at the City of San Francisco in the State of California and Northern District of California.

Now, Therefore, if the said James Lester French surrender himself in execution of the judgment, upon its being affirmed or modified, or upon the appeal being dismissed, or that in case of the judgment be reversed and the cause be remanded for a new trial he appear in the Court to which said cause may be remanded for a new trial and render himself amenable to any and lawful orders and process in the premises, then this recognizance shall be void, otherwise to remain in full effect and virtue. This recognizance shall be deemed and construed to contain the "express agreement" for summary judgment, and execution thereon, mentioned in Rule 34 of the District Court. As a further condition the defendant is prohibited from leaving the jurisdiction of this Court without authorization of the United States District Judge.

/s/ JAMES LESTER FRENCH.

[Seal] MICHIGAN SURETY COMPANY.

By /s/ WILLIAM G. HIMELHOCH,
Attorney in Fact.

Approved:

/s/ GEORGE H. BOLDT,
U. S. District Judge.

Acknowledged before me and approved the day and year first above written.

/s/ EDWARD J. McCORMICK, JR.,
Asst. United States Attorney for the Western District of Wash.

[Endorsed]: Filed February 6, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Moe Weise and James Lester French of Los Angeles, California, by and through their attorney, Robert M. Elias, of Suite 614-15 Arctic Building, Seattle, Washington, hereby make this Notice of Appeal from a judgment and sentence, dated February 6, 1957, of guilty to counts 1 and 2 of an indictment which, under both counts, charged a violation of Title 18, U.S.C., Section 1465.

Upon the court finding the defendant, Moe Weise, guilty as to counts I and II, the following judgment and sentence with respect to him was given:

> Four (4) years, with a fine of Five Thousand ($5,000.00) on Count I; and Four (4) years, with a fine of Five Thousand ($5,000.00) on Count II; the sentence as to confinement to

be concurrent and the fines to be non-cumulative; that is to say, a total imprisonment of Four (4) years and a total fine of $5,000.00, the defendant to stand committed until the fine adjudged against him shall have been paid.

Upon the court finding the defendant, James Lester French, guilty as to counts I and II, the following judgment and sentence with respect to him was given:

Two (2) years, with a fine of Twenty-five Hundred ($2,500.00) on Count I; and two (2) years, with a fine of Twenty-five Hundred ($2,500.00) on Count II; the sentence as to confinement to be concurrent and the fines to be non-cumulative; that is to say, a total imprisonment of two (2) years and a total fine of $2,500.00, the defendant to stand committed until the fine adjudged against him shall have been paid.

Oral notice of appeal having been given, the defendant, Moe Weise, was released on $10,000.00 bail and the defendant, James Lester French, was released on $5,000.00 bail.

I, Robert M. Elias, the attorney for the above-named appellants, hereby appeal to the United States Court of Appeals for the Ninth (9th) Circuit, from the above-stated judgment.

Dated this 13th day of February, 1957.

/s/ ROBERT M. ELIAS.

Copy of the within Notice of Appeal delivered to U. S. Attorney at Tacoma, and copy of said Notice of Appeal, together with the required abstract of docket entries sent to the Clerk of the U. S. Circuit Court of Appeals for the Ninth Circuit, this 13th day of February, 1957.

/s/ E. E. REDMAYNE,
Deputy Clerk.

[Endorsed]: Filed February 13, 1957.

DEFENDANTS' EXHIBIT A

United States District Court for the Western District of Washington, Northern Division

Commissioner's Docket No. 5

Case No. 225

UNITED STATES OF AMERICA,

vs.

MOE WEISE, Alias MOE WEISS, Alias MATT WEESE, and JOHN DOE, Whose True Name Is to the Complainant Unknown.

COMPLAINT FOR VIOLATION OF U.S.C. TITLE 18, SECTION 1465

Before: .....
Name of Commissioner

.....
Address of Commissioner

The undersigned complainant being duly sworn states:

That on or about March 17, 1956, in the Western District of Washington, Southern Division, Moe Weise, alias Moe Weiss, alias Matt Weese, and John Doe, whose true name is to the complainant unknown, did knowingly and unlawfully transport in interstate commerce for the purpose of sale and distribution obscene, lewd, lascivious and filthy matter of an indecent and immoral character, to wit: Packets of pictures of a pornographic nature.

Signature of Complainant:

/s/ CHARLES N. MINER,
Special Agent, F.B.I.

Sworn to before me, and subscribed in my presence March 17, 1956.

/s/ JOHN A. BURNS,
United States Commissioner.

Admitted February 5, 1957.

DEFENDANTS' EXHIBIT B

United States District Court for the
Western District of Washington

Commissioner's Docket No. 5

Case No. 225

UNITED STATES OF AMERICA,

vs.

MOE WEISE and JOHN DOE

WARRANT OF ARREST

To Any U. S. Marshal or other authorized officer:

You are hereby commanded to arrest Moe Weise and John Doe and bring them forthwith before the nearest available United States Commissioner to answer to a complaint charging them with on March 17, 1956, in the Western District of Washington, did unlawfully transport in interstate commerce obscene matters, in violation of U.S.C. Title 18, Section 1465.

Date: March 17, 1956.

/s/ JOHN A. BURNS,
United States Commissioner.

Return

Received March 18, 1956, at Seattle, Wash., and executed by arrest of Moe Weise & James L. French at Seattle, Washington, on March 17, 1956.

Date: March 18, 1956.

W. B. PARSONS,
U. S. Marshal, Western District of Washington;

By /s/ JAMES M. CLARK,
Deputy.

Admitted February 5, 1957.

In the District Court of the United States for the Western District of Washington, Southern Division

No. 16464

UNITED STATES OF AMERICA,
Plaintiff,

vs.

MOE WEISE, Alias MOE WEISS, Alias MATT WEESE, and JAMES LESTER FRENCH
Defendants.

TRANSCRIPT OF PROCEEDINGS

Appearances

On Behalf of the Plaintiff:
EDWARD J. McCORMICK, JR.,
Assistant United States Attorney.

On Behalf of the Defendants:
ROBERT M. ELIAS,
Attorney at Law.

PROCEEDINGS

(Thereupon, on the 5th day of February, 1957, at Tacoma, Washington, the following proceedings were had, to wit:)

The Court: United States vs. Moe Weise and James Lester French. Are the parties ready?

Mr. McCormick: Plaintiff is ready.

Mr. Elias: Defendants are ready.

Mr. McCormick: If the Court please, in the case of United States vs. Moe Weise and James Lester French, Number 16464, the defendants with their counsel, Mr. Robert Elias, stand before the Court. This matter comes on for arraignment and plea. It has been deferred until this time, your Honor.

The Court: As I recall it, the arraignment was deferred to meet the convenience of your clients, is that correct, Mr. Elias?

Mr. Elias: That is correct, your Honor.

The Court: Very well. Are you ready to proceed with the arraignment, Mr. Elias?

Mr. Elias: We are, your Honor.

The Court: Mr. Weise and Mr. French, are you ready to make your plea to the indictment in this case? [2*]

Mr. Weise: Yes, sir.

Mr. French: Yes, sir.

The Court: Do you wish us to read the indictment, or do you have it sufficiently in mind to waive reading?

Mr. Elias: Waive the reading of it.

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

The Court: Is that agreeable to both of you?

Mr. French: Yes, sir.

Mr. Weise: Yes.

The Court: I take it you have gone over the indictment with your counsel and are familiar with the nature of the charges made against you, are you?

Mr. Weise: Yes, sir.

Mr. French: Yes, sir.

The Court: By the way, what is your true name, Mr. Weise?

Mr. Weise: Moe Weise.

The Court: And that is spelled capital M-o-e, Capital W-e-i-s-e?

Mr. Weise: That is correct.

The Court: That is your true name?

Mr. Weise: Yes.

The Court: Mr. French, is this your true name, James Lester French? [3]

Mr. French: That's right.

The Court: Very well. Moe Weise, what is your plea to Count I of this indictment?

Mr. Weise: Not guilty.

The Court: And to Count II?

Mr. Weise: Not guilty.

The Court: James Lester French, what is your plea to Count I of this indictment?

Mr. French: Not guilty.

The Court: And to Count II?

Mr. French: Not guilty.

The Court: Let the record show the entry of a

not guilty plea to each and both counts by each and both defendants.

Very well. Are you ready to proceed with the trial of the action?

Mr. Elias: At this time the defendants wish to indicate to the Court that they waive the jury trial.

The Court: Do you wish to be heard on it?

Mr. McCormick: I do not wish to be heard.

The Court: Are you agreeable to that?

Mr. McCormick: I am agreeable to it, your Honor.

The Court: Now, Mr. Weise, your counsel [4] has indicated that you desire the case to be tried by the Judge alone without a jury.

Mr. Weise: Yes, sir.

The Court: You heard him make that statement, did you?

Mr. Weise: Yes.

The Court: Is that your personal desire?

Mr. Weise: Yes, sir.

The Court: Each of you?

Mr. French: Yes, sir.

The Court: You realize, I take it, that under the Constitution and laws of the United States any person who is charged with a crime is entitled to have the case tried by a jury if he desires, do you understand that?

Mr. Weise: Yes, sir.

Mr. French: Yes, sir.

The Court: And that privilege of having a case tried by a jury can under no circumstances be taken

away from you unless you waive it. Is that clear to both of you?

Mr. French: Yes, sir.

Mr. Weise: Yes, sir.

The Court: Do you wish to waive jury trial?

Mr. Weise: Yes, sir. [5]

Mr. French: Yes, sir.

The Court: Has anyone pressed you into this decision?

Mr. Weise: No, sir.

Mr. French: No, sir.

The Court: Neither your counsel nor anyone on behalf of the government, or anything of the kind? It is your own individual judgment about it, is it?

Mr. Weise: Yes.

Mr. French: Yes, sir.

The Court: All right. Now, do you understand that if the case be tried that way, then the Judge must decide both the facts and the law, and act as far as the facts are concerned, as a jury would? You understand that, do you?

Mr. Weise: Yes, sir.

Mr. French: Yes, sir.

The Court: Very well. Counsel, as an officer of the court are you satisfied that this waiver of jury trial is intelligently and understandably made, and free and voluntary in every respect?

Mr. Elias: I am, your Honor.

Mr. McCormick: I am not sure whether this waiver should be in writing. [6]

The Court: It may well be, but I don't think so.

Will you provide a written waiver if that be necessary, gentlemen?

Mr. Elias: Yes, sir, your Honor.

Mr. McCormick: I have no objection.

The Court: I will try the case non-jury. Are you ready?

Mr. McCormick: The United States is ready.

The Court: I have examined the indictment. Do you wish to make any opening statement?

Mr. McCormick: A very brief statement, your Honor.

The Court: You may do so.

Mr. Elias: I wonder if I may make a motion at this time?

The Court: Certainly.

Mr. Elias: At this time, your Honor, I am handing up a written waiver signed by Mr. McCormick of the United States District Attorney's office, myself as attorney for the defendants, Mr. Weise and Mr. French, to a jury trial in accordance with the Federal Rules of Criminal Procedure, Number 23.

The Court: Thank you, Mr. Elias.

Mr. Elias: I apologize for the form. We [7] wrote it at the desk.

The Court: It is quite satisfactory, and the waiver will be filed in the cause.

Mr. Elias: At this time also, if your Honor please, the defense respectfully moves to exclude all witnesses who are to testify except the ones presently testifying, and the reason for that motion is based upon the feeling of the defense that many legal points will come up involving the testimony

of the various witnesses, and I think that it is very important that each be allowed——

The Court: I think there is no need of any explanation. If you desire it, I will order it. I always follow that practice if either party requests it. Are there any of the people you want exempted?

Mr. McCormick: Agent Ciminera.

The Court: Anyone who is to testify, gentlemen, if you will please convene in the hall.

(Thereupon, all witnesses exited from the courtroom.)

The Court: All right.

Mr. Elias: For the purpose of the record, if your Honor please, comes now the defendants, by and through their attorney, Robert Elias, and [8] moves this honorable court to suppress the evidence. I would like to make a short statement; it will be similar to what we heard, but for this record I would like to indicate to the Court the grounds for——

The Court: You may do so.

Mr. Elias: Thank you, your Honor.

The first reason for this motion is that the affidavit on the complaint was sworn to by one Agent Hiner of the Federal Bureau of Investigation who had no knowledge of anything occurring other than through hearsay evidence, or even hearsay upon hearsay evidence. In other words, the Agent at no time saw the defendants, and to the knowledge of the defendants at this time, I don't know whether he has seen them since.

The second reason: That in the affidavit that is attached and is presently attached to the complaint and the preliminary hearing, and in the court file, signed by Agent Hiner, there are no facts whatsoever which could be used for probable cause as required under the Fourth Amendment, and, therefore, the United States Commissioner had no facts before him upon which he could decide whether or not there was probable cause to issue [9] the arrest warrant.

Reason number three: That in the subsequent hearing various affidavits were taken, and with all the information in the affidavits which were again hearsay statements by the Federal Bureau of Investigation, even with those facts there was not sufficient evidence to constitute probable cause, because it was mere suspicion and conjecture. At no time did anyone see any pictures put in any car. At no time did anyone see anybody take any pictures out of a car, and at no time did any action on the part of either of these defendants indicate anything other than traveling between states, which, of course, is legal for anyone to do, and the big item that apparently the Federal Bureau of Investigation relied upon was that the car was loaded, and, of course, that is mere suspicion and conjecture. The springs could have been broken, and there could have been a thousand reasons indicating the condition as it appeared to the agents.

Number three: Officer Ralston, who apparently made the arrest, made the arrest based on the issuance of the arrest warrant which we previously

have indicated in our humble opinion was [10] illegal; therefore, the arrest was illegal.

Number four: The facts elicited in the affidavits of the Federal Bureau of Investigation referred to acts apparently occurring somewhere in California, and I would like to call this honorable Court's attention to both counts I and II wherein they indicate that the acts were acts which occurred between Portland, Oregon, and Tacoma, Washington, and any and all facts outside of that particular area are immaterial in this particular case, and any and all facts outside of March 17 as alleged in the information, when they crossed the—if that is the time that they crossed the Oregon-Washington border, are immaterial.

This motion, therefore, amounts to this, that as the warrant of arrest was illegally issued, the arrest itself was illegal, and, therefore, any evidence recovered in an illegal arrest should be suppressed.

Thank you.

The Court: The motion is denied, and exception allowed.

Mr. McCormick: Your Honor, counsel, the Court is, of course, familiar with the statute in question. The Court has likewise indicated [11] he has read the indictment.

In order to give a brief framework of the evidence the United States intends to present, we intend to show that on March 17, 1956, acting upon information received, surveillance was instituted in Oregon in the City of Portland; that the two defendants were, and I will use the term again and again, surveilled, which is a Federal Bureau of In-

vestigation term meaning observed, I take it; that the defendants were surveilled in and about Portland, Oregon; that they were further specifically surveilled as they crossed the interstate bridge to Vancouver, Washington; that the surveillance continued up through Kalama, Washington, where a brief stop was made, nothing was taken from the car, and nothing was placed in the car; that the surveillance was continued to a point outside the Fort Lewis Reservation where a very brief stop was made at an isolated spot to change drivers. They were observed at that time. Nothing was taken out of the car and nothing was placed in the car; that at a point in the City of Tacoma acting under the direction of Special Agent Ralston, the F.B.I. Agents closed in and arrested these defendants who stand or sit [12] in Court, in their car, which, of course, will be further described in the testimony; that in that car was found certain evidence which will be properly placed before the Court; that that evidence consisted of books, pictures, images, of an obscene, lewd, lascivious nature —your Honor has to make that determination in accordance with the law; that the purpose of the transportation across interstate lines was for the purpose of sale and distribution.

The Court: Did you wish to make any further statement, Mr. Elias?

Mr. Elias: An additional motion, I would like to move for dismissal on the grounds that the United States Attorney failed to establish a prima facie case in his opening statement.

The Court: The motion is denied, and an exception is allowed.

Mr. Elias: May I make one more short addition to my previous motion?

The Court: Yes.

Mr. Elias: I would like to call your Honor's attention to a decision of the Honorable John C. Bowen in a recent case involving stevedores. I just feel this point is so important that I would [13] like to bring this to the Court's attention. In that particular case there was pilfering from the warehouse down on the water front by stevedores, and the F.B.I. set up a trap for these—not an illegal trap, but a trap for these people to catch them. They knew the people ahead of time and had them by number, one, two; one was Mr. Smith, two was Mr. Jones, and so forth, and that an F.B.I. Agent observed the defendant taking a bottle from a case which later turned out to be a vodka bottle; that he had a walky-talky and conveyed that information to another F.B.I. agent in a car two or three blocks away; that again that information was conveyed by radio to another agent, and maybe two more, one of which swore out an arrest warrant.

The Honorable John Bowen, as I understand it, suppressed all the evidence with respect to the recovery under the search warrant for the reason that the search warrant was issued by hearsay evidence alone.

The Court: I am familiar with that situation. I think it is distinguishable.

The motion is denied, and exception allowed. Do you wish to make any opening statement? [14]

Mr. Elias: Waive the opening statement at this time.

Mr. McCormick: The United States calls Special Agent Sloat.

DONALD H. SLOAT

called as a witness on behalf of the Plaintiff, being first duly sworn, was examined, and testified as follows:

The Clerk: State your name and spell your last name for the reporter, please.

The Witness: Donald H. Sloat, S-l-o-a-t.

Direct Examination

By Mr. McCormick:

Q. You are an F.B.I. Agent, are you not?

A. That is correct.

Q. I direct your attention to March 17, 1956. You were an agent at that time?

A. That's correct.

Q. And where were you stationed?

A. Portland, Oregon.

Q. Did you receive—without telling us what they said, did you receive any special instructions concerning a surveillance on that day? [15]

A. Yes, I did. I was instructed to——

Q. Don't tell us what they were. Tell us as a result of those instructions, what did you do? What

(Testimony of Donald H. Sloat.)

persons and cars, et cetera, did you observe and where did they go?

Mr. Elias: Object to any further testimony without further foundation than this along the lines that counsel suggests. It is absolutely immaterial.

The Court: Overruled. Go ahead.

A. I was instructed to proceed to the southeast section of Portland, and there——

The Court: Mr. Sloat, not what you were instructed, what you did. There is a little distinction about it.

A. I understand. I proceeded to the southeast section of Portland and there took up a position at Southeast 82nd Street and Powell, waiting arrival of a late model Buick hardtop with a red body and cream top with California license HDA 216.

Q. (By Mr. McCormick): Did that car come within your vision eventually? A. Yes, it did.

Q. Will you describe what then happened?

A. Well, at approximately 1:20 the car that we were awaiting approached the corner and pulled into a Flanigan's [16] Restaurant which is located at Southeast 82nd and Powell in Portland. Two men got out of the car and went into the restaurant.

Q. Now, did you observe those men?

A. Yes, sir. I did.

Q. Would you recognize them if you saw them again? A. Yes, sir, I would.

Q. Are they in this courtroom?

A. Yes, sir, they are.

Q. Will you point them out, please?

(Testimony of Donald H. Sloat.)

A. The men behind counsel, the two men there (indicating).

Mr. McCormick: May the record show the witness indicated the Defendants Moe Weise and James Lester French.

The Court: I think that is correct, he did.

Q. (By Mr. McCormick): Tell us then, what happened?

A. We waited outside the restaurant until approximately 2 o'clock, and the two men came out and got into their car and proceeded to Southeast Hawthorne and 13rd Avenue in Portland.

Q. Who was driving, if you know?

A. Mr. Weise. At that time we observed the two men to get out of the car, but due to the position of our automobile we were unable to see where they went. We waited at that— [17] in that location for approximately 40 or 45 minutes. About 3:35 the two men came out of the neighborhood and re-entered their car and proceeded to the corner of Southwest Second and Morrison in Portland and parked the car in a Chevron parking lot at the corner. We then observed Mr. Weise to go into a cardroom, or next to a cardroom, a display shop called "Tony's Place," which was at 608 Southwest Second. A Mr. French remained outside on the street.

Q. When you say on the street, do you mean in the car or on the sidewalk?

A. No, he was on the sidewalk. Mr. Weise remained inside for approximately 30 minutes and

(Testimony of Donald H. Sloat.)

then came outside, made a trip to the car and took a box out of the car.

Q. Would you describe that box as well as you can recall it, please?

A. I didn't get a close observation of the box but from where I was, approximately a half block away, it appeared to be approximately eighteen inches deep by twelve by about six. That is just a rough estimate from that distance. It appeared to have a string or a handle on top because he didn't carry it in his arms, he carried it in his hand and proceeded back to Tony's Place.

Q. Did you observe the color?

A. I didn't get a good look. It appeared to me to be gray. [18] From that distance I wasn't sure of the color.

He proceeded back to Tony's Place with the box and went inside, and in about five minutes he came out, returned to the car and this time took what looked like a black suitcase and another box of approximately the same size out of the car. Mr. French assisted him in taking the box back to Tony's Place, and the suitcase, and they went inside and came out—or when Mr. Weise came out he did not have any of the articles.

They then proceeded together to the Fourth Avenue Smokeshop at Southwest Fourth and Morrison Avenue in Portland. Again, Mr. French remained on the street and Mr. Weise went into the Smokeshop at that address. He was in there until approximately 5:15 when he came out and talked with Mr.

(Testimony of Donald H. Sloat.)

French for about three or four minutes on the street and then went back inside the Fourth Avenue Smokeshop.

I observed Mr. Weise to come out of the Smokeshop at approximately 5:40, go back to the parking lot and this time took two smaller boxes—it appeared to be two smaller boxes out of the car, and returned with them to the Fourth Avenue Smokeshop and go inside. This was approximately 5:50 on the 17th of March, in 1956, and at that time I discontinued the surveillance until approximately 7:30 that night. [19]

We sat on the corner, and I got back in the car in which we were appearing in, and we waited at the corner. At about 7:30 I observed Mr. French driving the car of Mr. Weise.

Q. Well, do you know who owned the car?

A. I meant to say that Mr. French was driving the car that Mr. Weise had formerly been driving. I don't know the owner.

Mr. French stopped on the corner of Fourth and Southwest Morrison, and Mr. Weise got in the rider seat on the righthand side. Together they went to the Northeast section of Portland and stopped at the foremost cafe on Northeast Union not too far from the Vancouver interstate bridge. They went inside, and I observed both men sitting at the counter and eating. They stayed inside until approximately 8:20 that evening, and then both came out, got into the car, and this time Mr. Weise was driving. I observed them to go over the Vancouver bridge and enter the State of Washington at that point.

(Testimony of Donald H. Sloat.)

Q. What was your relation to their car when you say you observed them cross the bridge?

A. We were following in our car. There was another agent and myself. We followed at a distance not exceeding a half a block. [20]

Q. And after having crossed the Vancouver—the Portland-Vancouver bridge, what then happened?

A. We followed the car until it reached Kalama, Washington, which occurred at approximately 8:55 in the evening.

Q. What took place there?

A. We noticed that the car pulled into a gas station on the south edge of Kalama, Washington, and I observed Mr. Weise to get out, go to the rear of the car and talk to a gas attendant. We were then forced to pull around the block, and when we returned to our position behind their car Mr. Weise was back in the car and the car was moving off from the gas station.

Q. Approximately how long would the car have been out from your surveillance at this time that you mentioned?

A. Well, not over five minutes.

Q. Did you communicate with anyone by any means at that time?

A. Yes. When we observed the car pulling into the gas station, by radio contact with the other cars on the surveillance we told them that they were pulling in and that we felt since there was no——

Mr. Elias: I object to anything he felt, your Honor.

(Testimony of Donald H. Sloat.)

The Court: Don't say what you felt, but what you said. Anything you said you may state. [21]

The Witness: Yes, your Honor. We said we would pull around the block and return to our position.

Mr. Elias: Object to what—just a moment, what the witness said, if your Honor please. It is what he did.

The Court: What he said he may also testify.

The Witness: We said to the other car, we were in radio communication, that we would pull around the block and return to our position behind Mr. Weise's car on the highway.

Q. (By Mr. McCormick): Did you do so?

A. Yes, sir, we did do so.

Q. You testified a moment ago, then, that the car was pulling out by the time you came back into position? A. That is correct.

Q. What transpired after that?

A. We continued the surveillance until we reached a position approximately fifteen miles north of Centralia, Washington, and then returned to Portland.

Q. Were any more stops made by the car in that distance? A. Not while we were there.

Q. And did you receive instructions at the time you turned back? [22]

A. Yes, sir, we did. We were instructed——

Q. I mean you turned back as a result of instructions? A. That's correct.

Mr. McCormick: Cross examine, please.

(Testimony of Donald H. Sloat.)

Cross-Examination

By Mr. Elias:

Q. Mr. Sloat, what was the color of the package you saw, or the packages which you saw Mr. Weise take out of the car in Portland?

A. It was approximately a half block distance.

Q. I know, but the color of the package?

A. It appeared to be a light color, possibly a gray. At a half a block I wasn't sure of the color. It appeared to be gray.

Q. At a half a block were you sure of the size of the package?

A. Well, the approximate size, yes, sir.

Q. What size did you say it was?

A. Well, it was about eighteen inches high (indicating). In other words, the package had a string or a handle, and when I speak of height, I mean this dimension (indicating).

The Court: Vertical? [23]

The Witness: Yes, sir, vertical; yes, sir. Approximately twelve by nine, and the twelve would be the length, and I felt that it would be about nine inches wide.

Q. (By Mr. Elias): And you observed that from a half block away, did you?

A. Yes, sir.

Q. Did you say a string or a handle? You assumed that because it was hanging down from his hand, is that what you meant by that?

A. Yes, sir. He wasn't carrying it.

(Testimony of Donald H. Sloat.)

Q. Could it have been a suitcase of some sort?

A. The first box that he took out did not appear to be a suitcase.

Q. But you wouldn't know from where you stood?

A. No, sir.

Q. You indicated that you thought he took a suitcase out later, is that correct? Did I follow you on that?

A. Yes. He went to Tony's Place with the box and then returned to the car and took another box, and that appeared to be a black suitcase.

Q. Could that have been a box?

A. Yes, sir, it could have been a black box with a handle.

Q. And, in other words, you were so far away you just know he had some packages of some sort, and they looked like [24] they must have had some handles because they were hanging down from his hands?

A. Yes, sir.

Q. You were assuming they were boxes or assuming they were suitcases?

A. Yes, sir.

Q. Now, you also indicated, Mr. Sloat, that they were out of your surveillance in Portland from about ten minutes to 6 until 7:30, is that correct, about an hour and a half?

A. I observed Mr. Weise to return to the car, and the time was approximately 5:40. He returned to the Fourth Avenue Smokeshop with the small boxes, as I indicated, and at that time we discontinued the surveillance until 7:30—about 7:30 that evening.

Q. So they were out of your sight about from ten

(Testimony of Donald H. Sloat.)

minutes to 6 to 7:30, which would be an hour and a half or an hour and 40 minutes? A. Yes, sir.

Q. Then you say you followed the car to Kalama?

A. Yes, sir, after the stop at the restaurant.

Q. After the stop at the restaurant on the Oregon side? A. Yes, sir.

Q. Then they drove on across the bridge into Kalama? A. Yes, sir. [25]

Q. Then they stopped at a gas station?

A. Yes, sir.

Q. And when you state they were out of your sight for about five minutes, do you mean the car was out of your sight or these individuals were out of your sight?

A. No, sir. We drove around the block in our car, and everything was out of our sight. We didn't see the car or the men.

Q. When you went around the block?

A. Yes, sir.

Q. How long a period was that?

A. Well, it was not over five minutes. I would say probably more accurately about three.

Q. When you got back after driving around the block, where were these people, out of the car, inside, in sight, out of sight, or what, when you first came back?

A. They were both out of sight at that time, and the car was pulling out of the gas station.

Mr. Elias: That is all, your Honor.

Mr. McCormick: One more question.

(Testimony of Donald H. Sloat.)

Redirect Examination

By Mr. McCormick:

Q. When you said, Mr. Sloat, that you discontinued your surveillance, did you go somewhere else, or what were [26] the circumstances at about 5 o'clock?

Mr. Elias: Object to the leading question.

The Court: Well, I don't think that is prejudicially leading. It calls the witness' attention to the subject matter. Overruled. Answer it.

A. By "discontinued" I mean that I had followed Mr. Weise back to the Fourth Avenue Smokeshop. At that time I returned to my office for a period of an hour and a half and returned—we got a bite to eat, and I returned to the car at the corner of Fourth Avenue and Southwest Morrison at about 7:30.

Mr. McCormick: No more questions.

The Court: I believe that is all, Mr. Sloat. You are excused.

(Witness excused.) [27]

DAVID K. MITCHELSON

called as a witness on behalf of the Plaintiff, being first duly sworn, was examined and testified as follows:

The Clerk: State your full name and spell your last name.

The Witness: David K. Mitchelson, M-i-t-c-h-e-l-s-o-n.

(Testimony of David K. Mitchelson.)

Direct Examination

By Mr. McCormick:

Q. Mr. Mitchelson, you are an F.B.I. Agent?

A. Yes, sir.

Q. Where are you stationed?

A. Vancouver, Washington.

Q. I will ask you to look at the second and third persons sitting at the far side of the counsel table from me and tell me if you recognize them?

A. The first gentleman—or the second gentleman is Mr. Moe Weise, and the third one is James Lester French.

Q. And where, if any place, have you seen them before?

A. Here in Tacoma on March 17, 1956.

Q. Now directing your attention to March 17, 1956, were you on duty that day?

A. Yes, sir, I was.

Q. At what point? [28]

A. In Vancouver, Washington, during the afternoon and early evening.

Q. Did you—without telling us what they were, did you receive any instructions as to a special surveillance that day? A. Yes, sir, I did.

Q. And as a result of such instructions did you take any action? A. I did.

Q. Will you tell us what action you took as distinguished from anything you were told?

A. At approximately 7 p.m. that evening I

(Testimony of David K. Mitchelson.)

stationed myself in a government vechicle immediately south of the interstate bridge in the State of Oregon.

Q. Is that the Portland-Vancouver bridge?

A. The interstate bridge between the State of Oregon and the State of Washington.

Q. Were you looking for anything?

A. Yes, sir.

Q. What were you looking for?

A. I was looking for a California licensed car HDA-216, a 1955 or 1956 model Buick, cream and red, hardtop.

Q. And did that car come within your range of vision? A. It did.

Q. Can you tell us what then happened? [29]

A. At approximately 8:30 I moved across the interstate bridge, and just as I left the approach of the bridge in the State of Washington, that car passed me.

Q. Did you have a reason for moving across the bridge ahead of this car?

A. Yes, sir. I was advised to do so by radio.

Q. You then moved across the bridge and the car passed you? A. Yes, sir.

Q. What then happened?

A. I followed the car to Tacoma, Washington.

Q. Will you describe what took place on that journey?

A. Yes, sir. At Kalama, Washington, the car stopped for approximately five minutes at the George Wheeler service station. I parked on the main high-

(Testimony of David K. Mitchelson.)

way, and the service station is on a frontage road immediately alongside the highway, and I was able to observe the car during the time he was in the service station. An attendant approached the car and appeared to fill it with gasoline, and during that time one of the drivers of the car, who I later determined to be Mr. Weise, got out and talked to the attendant as the gasoline was being put into the car.

Q. When you say you later determined him to be Mr. Weise, could you recognize that individual then?

A. Yes, sir. As a matter of fact, I called the other surveilling car by radio and he advised me it was Mr. Weise. [30]

Q. In other words, you could see the person?

A. Yes, sir.

Q. During this stop at the gas station, how long was that? A. Approximately five minutes.

Q. And you said that Mr. Weise talked to the gas attendant? A. Yes, sir.

Q. Was anything placed in the car?

Mr. Elias: Object to the leading question, your Honor.

The Court: Overruled.

Q. (By Mr. McCormick): Was anything placed in the car?

A. I did not observe anything being placed in it other than the hose in the gas tank.

Q. Was anything taken out of the car on your observations? A. No, sir.

(Testimony of David K. Mitchelson.)

Q. Now, after the conclusion of this five minutes at Kalama, then what happened?

A. The car left driving north on the main highway, Highway 99, and I proceeded to follow it again, and the car proceeded through Olympia, and then about a half mile south of the main gate of Fort Lewis it stopped for a moment. I passed it and advised the other cars that I was so doing, and stopped just a few seconds. In perhaps half a minute the car repassed me proceeding north. [31]

Q. Will you describe the nature of the territory where the car stopped?

A. As far as I could ascertain at that time, there were no business buildings there or residences. It was an isolated portion of the highway.

Q. And you then passed the car?

A. No. I remained behind the car from then on all the way until we reached an area down near the downtown area of Tacoma here.

Q. Just to get straightened out, what was your position with relation to the car as you approached this point near Fort Lewis?

A. I was immediately behind the defendant's car.

Q. Then what happened?

A. I passed them at the time they stopped, and the defendants' car repassed me and I followed behind them.

Q. What next happened?

A. As we neared the downtown area here in Tacoma I received instructions by radio from Special Agent Ralston that they were to stop the car——

(Testimony of David K. Mitchelson.)

Mr. Elias: Object to any instructions received over a radio.

The Court: The fact that you received instructions you can say, but not what they were. What you did you may tell us about. [32]

The Witness: I received instructions and I stopped my car immediately behind the defendants' car and moved to the driver's side and instructed Mr. French who was then driving, that he was under arrest.

Q. (By Mr. McCormick): Let me ask you, was anything going on at that time that you could observe? In other words, why did the defendants' car stop, if you know?

A. The car immediately ahead of me had turned a red light and a siren on and forced them to the curb.

Q. All right. Will you please continue and tell us what you did?

A. I merely then led Mr. French around to the sidewalk alongside where the car was parked and placed him alongside of Mr. Weise.

Q. And where in relation to the car and the sidewalk or the fronting buildings were the defendants at that time?

A. Well, the defendants were on the sidewalk immediately alongside the building adjacent to where the car was parked.

Q. Did you say anything to the defendants at that time?

(Testimony of David K. Mitchelson.)

A. Yes, sir. In response to a question from Mr. Weise.

Q. What was that question?

A. The question was, "Well, what is this all about? What is the reason for this?" [33]

Q. What did you say?

A. I told him that they were being arrested on charges of transporting obscene matter interstate.

Q. What did you then do?

A. I merely remained with the rest of the agents and we drove to the office here in this building in Tacoma.

Q. And did you take part in any interviews, or anything, with the defendants?

A. No, sir. I did observe the defendants in the office here in Tacoma. That is all.

Q. What were they doing insofar as you could observe?

A. Mr. Weise was talking to Agent Buchman, and I believe Agent Silvey talked to Mr. French. Then other agents were bringing material into the office, boxes, which they put in one room.

Q. Did you observe any further actions with regard to those boxes?

A. Yes. I observed Mr. Weise pass along and write his name identifying boxes as being his property.

Q. You do not of your own knowledge know what happened to those boxes? A. No, sir.

Mr. McCormick: Cross-examine. [34]

(Testimony of David K. Mitchelson.)

Cross-Examination

By Mr. Elias:

Q. When did you first observe this car that these two defendants were riding in, sir?

A. Just immediately after it left the approach, the north approach of the interstate bridge going into the State of Washington.

Q. And you followed them from there on up to the place in Tacoma where they were arrested?

A. Yes, sir.

Q. And were you the one that placed them under arrest? I believe you stated you stepped up and placed Mr. French under arrest, is that correct?

A. That's right.

Q. Did you place him under arrest?

A. Yes, sir.

Q. And did you place Mr. Weise under arrest also?

A. No, sir. He was already in custody of other agents.

Mr. Elias: No further questions, your Honor.

The Court: I believe that is all, Mr. Mitchelson. You are excused. Thank you.

(Witness excused.) [35]

HAROLD L. BUCHMAN

called as a witness on behalf of the Plaintiff, being first duly sworn, was examined and testified as follows:

The Clerk: Please state your full name and spell your last name.

The Witness: My name is Harold L. Buchman, B-u-c-h-m-a-n.

Direct Examination

By Mr. McCormick:

Q. You are an Agent of the F.B.I., Mr. Buchman? A. Yes, sir.

Q. What is your duty station?

A. Vancouver, Washington.

Q. I direct your attention to March 17, 1956, were you on duty that day? A. Yes, sir.

Q. I will ask you to look at the second and third gentlemen on the far side of the counsel table from me and tell me if you have seen them before?

A. Yes, sir, I have.

Q. Do you know their names?

A. Yes, sir, I do.

Q. Will you state who they are and indicate their positions at the table? [36]

A. The second from the front is—I know to be Moe Weise. The second man is Lester French.

Q. Do you mean the third man at the table?

A. Yes, sir, that's right.

Q. And you have seen them before?

A. Yes, sir, I have.

(Testimony of Harold L. Buchman.)

Q. Will you state generally when and where you saw them?

A. It was on March 17, 1956, in Tacoma.

Q. I will ask you if you had a particular duty assignment on that day?

A. Yes, sir. I had an assignment.

Q. I will ask you if in accordance with instructions, and do not say what the instructions were, but I will ask you in accordance with instructions did you take a particular duty station on that date?

A. Yes, sir. I took up a position in an automobile about one mile north of Vancouver, Washington, on Highway 99.

Q. Were you looking for any particular thing?

A. Yes, sir. We were—I was looking for——

Mr. Elias: Object to what they were looking for, if your Honor please.

The Court: Overruled.

Q. (By Mr. McCormick): You may continue.

A. I was looking for a late model Buick, cream and red in color, bearing California license [37] HAD-216.

Q. And did that car come within your vision?

A. Not at that particular station I was at.

Q. Will you tell us what you did after taking station at that point?

A. At approximately 8:30 I proceeded——

Q. If you received instructions you may state that, but do not state what the instructions were.

A. I received instructions to proceed north——

Mr. Elias: Object to what the instructions were.

(Testimony of Harold L. Buchman.)

The Court: Yes. The point of the matter is, Mr. Buchman, it is just a manner of speaking, you can state you received instructions but not what they were. Then you can tell us what you did. Do you understand?

The Witness: Yes, sir.

The Court: There is a refinement there of not reciting hearsay, but you may state what you did.

The Witness: Yes, sir.

The Court: All right.

The Witness: I proceeded north on Highway 99 in a northerly direction, in the direction of Olympia, Washington. I proceeded to a point approximately ten miles [38] south of Olympia, Washington, at which juncture I pulled on the side of the road and observed the late model Buick bearing the California license I mentioned come into view.

Q. (By Mr. McCormick): And from what direction did it come?

A. From a southerly direction.

Q. Did it pass you? A. Yes, sir, it did.

Q. What did you then do?

A. I took up a position in back of the automobile and proceeded in a northerly direction.

Q. Now, will you tell us just in narrative form what occurred from then on?

A. The car proceeded to a place, that is the Buick, to a place in the vicinity of Fort Lewis, and I observed it to pull on the side of the road which I also did about, oh, maybe twenty-five yards in the rear of it.

(Testimony of Harold L. Buchman.)

Q. Again, without repeating anything you may have heard, had you any reason for so stopping?

A. Yes, sir, I had.

Q. What was that reason?

Mr. Elias: Objection. It is immaterial.

The Court: Well, it may be there is something objectionable. Was it pursuant [39] to instructions or something of that kind?

The Witness: Yes, sir, I did.

The Court: That is proper. Go ahead.

Q. (By Mr. McCormick): You stated that you stopped about twenty-five yards in the rear, is that correct? A. That is correct.

Q. And will you describe the nature of the terrain where you stopped?

A. It was a very isolated area. There were no residences within view, or business establishments.

Q. How long did the Buick stop?

A. Oh, I would judge about ten or fifteen seconds.

Q. What if anything happened?

A. I observed one of the passengers in the automobile walk across the front of the car and get into the driver's seat.

Q. Do you know who that person was?

A. Yes, sir, Lester French.

Q. Had you been aware up to that time who was driving? A. No, sir, I was not.

Q. Now, was anything placed in that car at that point to your observation?

(Testimony of Harold L. Buchman.)

Mr. Elias: Object to the leading question, your Honor.

The Court: Overruled. [40]

The Witness: I did not observe anything placed in the car.

Q. (By Mr. McCormick): Could you have so observed had any bulky object been placed in the car? A. I think so, sir.

Q. What then happened after the car moved off?

A. I took up a position immediately behind it and followed it in to Tacoma, Washington.

Q. And did anything happen in Tacoma?

A. Yes, sir. The car was stopped and the occupants placed under arrest.

Q. When you say the car was stopped, will you describe what physically occurred?

A. There was another car in front of the Buick which pulled their car to the side of the street, and I pulled up immediately behind the Buick.

Q. What then occurred?

A. I proceeded to the righthand side of the car and asked the occupant of the seat on that side to get out.

Q. Who was that person?

A. That was Moe Weise.

Q. And did he so get out?

A. Yes, sir, he did.

Q. Were you at that time able to look into the car? A. Yes, sir, I did. [41]

Q. Will you describe the condition of the car as to loading, and so forth?

(Testimony of Harold L. Buchman.)

A. There were a large number of cartons in the rear of the car. They were stacked up approximately level with the front seat.

Q. And what was in the front seat, if anything?

A. Other than the two passengers, that is all I noted.

Q. Did you observe anything that was in the boxes in the rear of the car?

A. I noted that one carton was opened, and I lifted the lid and noted that there were some nude women pictures there—pictures of nude women in the carton.

Q. Could you tell us approximately the size of those, if you recall?

A. Oh, I think they were about four by five, or thereabouts, inches.

Q. Now, after inviting Mr. Weise to step out of the car, did he do so? A. Yes, sir, he did.

Mr. Elias: Object to counsel's terminology. There is no indication that this man "invited" him out of the car.

The Court: He had previously said he asked him to get out. I suppose "invite" might be a little more polite way of saying it, [42] but I will have to judge that. Go ahead.

Q. (By Mr. McCormick): What were the physical activities of the two defendants, then, at that point as you observed them?

A. Well, both of them got out of the car, and they were advised that they were under arrest.

Q. Did you hear them?

(Testimony of Harold L. Buchman.)

A. I advised them of such.

Q. And did they stay at their car, or what happened from that point on?

A. Well, after they got out of the car we did search them to be sure they had no weapons on them, and we later took them down to the office of the Resident Agent of the F.~~B.I.~~ in Tacoma.

Q. Did you accompany them or proceed by another means of transportation?

A. I accompanied them in the same automobile.

Q. And what persons were in that automobile?

A. Besides the two defendants there were two agents, Agents Ralston and Silvey, besides myself.

Q. What automobile was that?

A. It was a Bureau automobile.

Q. Did you have——

Mr. Elias: I didn't catch that.

The Court: Bureau automobile.

The Witness: F.B.I. [43]

Mr. Elias: Thank you.

Q. (By Mr. McCormick): Did you have any conversation with the defendants in the car?

A. I had no conversation with them, no.

Q. Did you hear any conversation on the part of the other agents?

A. Yes, sir. Agent Ralston advised them that any statements that they made could be used against them, and that they were entitled to the services of an attorney.

Q. And was there any reply to that?

A. I don't recall any.

(Testimony of Harold L. Buchman.)

Q. You said you went to the Tacoma Resident Agency, and what transpired after you got there?

A. I conducted an interview of the defendant Weise.

Q. Did you give him any admonitions or instructions, or anything, before interviewing him?

A. Yes, sir. At that time I advised him that he was entitled to the sevices of an attorney, and that any statements that he did make could be used against him in a court of law, and that he was under no obligation to talk to us at all.

Q. Did he say anything to that?

A. Yes. He said he was well aware of that.

Q. And did he thereafter talk to you?

A. Yes, sir, he talked to me. [44]

Q. Will you give the general substance of his statement to you?

Mr. Elias: Object to the general substance.

The Court: Yes. He will have to state what was said.

Mr. McCormick: That is what I meant, your Honor. I beg you pardon, your Honor.

The Court: I thought you meant to characterize it. It will have to be what he said.

Q. (By Mr. McCormick): Tell us what was said by Mr. Weise at that time?

A. Well, he made some statements. He asked questions as to how we knew that he had proceeded up to the area in which he was. He stated that he had brought some packages from California, on the out-

(Testimony of Harold L. Buehman.)

skirts of Los Angeles, and I asked him at that time whether all of the contents of the boxes were similar to that which I had seen when I looked in the car at the time of his arrest, and he said no, that some of them were of a more rough nature, and I asked him what he meant, and he said, "Possibly you would consider them to be obscene."

Q. Was anything said about his journey from whatever point he had come from? [45]

A. I asked him if he had sold any of this material on the way up, and he stated, yes, that he had. He sold some in San Francisco and some in Oakland and some in Portland.

Q. Was anything said about the relationship between James Lester French and himself?

A. Yes. He said that part of the material that was in the car belonged to him, and some of the material belonged to Lester French.

Q. Did he indicate any desires?

A. He stated that he would like to identify that which was his.

Q. Did you say anything to him at that time?

Mr. Elias: Object to this leading question method of interrogation.

The Court: I don't think so. Did he say anything to him? That is certainly not leading. Go ahead. Did you say anything to him?

The Witness: I told him he was at liberty to identify his packages if he so desired

Q (By Mr. McCormick): Did he do anything in your presence? A. No, sir.

(Testimony of Harold L. Buchman.)

Mr. McCormick: You may cross-examine, please. [46]

Cross-Examination

By Mr. Elias:

Q. Officer, you say you placed both men under arrest? A. I placed Moe Weise under arrest.

Q. By what authority?

A. I was acting under instructions.

Q. Instructions from somebody else? Somebody else told you to place them under arrest?

A. That is correct.

Q. I assume that was over the radio?

A. That was over the radio.

Q. The first time you saw this car was where?

A. Approximately ten miles south of Olympia, Washington.

Q. And you followed it from there up to the place where the defendants were apprehended?

A. That is correct.

Mr. Elias: At this time I would like to move that all the evidence testified to by this witness be stricken from the time he stated that he placed the defendant Moe Weise under arrest, for the reason that there is no showing it was a lawful arrest, and should be suppressed along with any additional evidence that occurred after that particular time. [47]

The Court: Motion denied. Exception allowed. I will consider it all more fully at a later time on the same general point.

Mr. Elias: Thank you, your Honor. No further questions.

(Testimony of Harold L. Buchman.)

The Court: That is all, I believe.

Mr. McCormick: One more question.

The Court: I beg your pardon.

Redirect Examination

By Mr. McCormick:

Q. Mr. Buchman, whose instructions did you act under when you placed Moe Weise under arrest?

A. Special Agent Ralston.

Mr. McCormick: No further questions.

The Court: I believe that is all, Mr. Buchman, you are excused.

(Witness excused.)

Mr. Elias: If your Honor please, just to eliminate interruption, could I have an understanding with the Court that this is a constant objection of mine on the motion to suppress during all of this testimony, or do you want me to——

The Court: Of course you may have that [48] understanding. I appreciate your suggesting it because it saves the interruption.

Mr. Elias: And the time.

The Court: You may have a continuing objection throughout the trial along the line that you have just stated with respect of similiar testimony.

Mr. Elias: Thank you, your Honor.

Mr. McCormick: At this time, your Honor, now we are going to get into the physical marking of evidence. As your Honor and Mr. Elias can see, there is a considerable amount of it.

I want to handle this matter as conveniently as I can for all concerned, and it would be my suggestion that as the individual boxes are identified or not identified as the case may be, that they be marked.

The Court: Do you want to consider attending to that matter while we recess and let you get together on that phase of it? Would that be agreeable to you?

Mr. Elias: Yes, sir.

The Court: Very well. Recess until 1:30.

(Thereupon, a recess was taken until 1:30 p.m. of the same day.) [49]

Afternoon Session

(Thereupon, at 1:30 o'clock p.m. the following proceedings were had, to wit:

FRANK WILLARD RALSTON

called as a witness on behalf of the Plaintiff, being first duly sworn, was examined and testified as follows:

The Clerk: Please state your full name and spell your last name.

The Witness: My name is Frank Willard Ralston, R-a-l-s-t-o-n.

Mr. McCormick: Before commencing the examination of Agent Ralston, I would like to state for the record that during the recess of the court with the consent of defense counsel Plaintiff's Exhibits 1 to 51 for identification have been marked.

The Court: Thank you.

(Testimony of Frank Willard Ralston.)

Direct Examination

By Mr. McCormick:

Q. Mr. Ralston, you are an F.B.I. agent?

A. Yes, sir.

Q. Where are you stationed?

A. Fort Worth, Texas. [50]

Q. Directing your attention to March of 1956, where were you stationed?

A. I was in Tacoma, Washington, at that time.

Q. And what was your designation or rank within the F.B.I.?

A. I am a Special Agent and I was designated the Senior Resident Agent at Tacoma.

Q. Is that a sub-office or something of the sort?

A. Yes, sir. It is a resident agency outside of the Seattle office for administrative purposes that covers all the State of Washington, and any place that has enough population, enough work to keep one or more special agents has them assigned there as resident agents. If there is more than one, one of them is a senior resident agent.

Q. I will direct your attention specifically—strike that. I will ask you to look at the gentlemen who are seated at the far side of the other counsel table, second and third, behind Mr. Elias, and I will ask you if you have seen them before?

A. Yes, sir.

Q. Do you know them by name?

A. Yes, sir. The middle one there gave his name

(Testimony of Frank Willard Ralston.)

as Moe Weise, W-e-i-s-e, and the last one is Lester French, James Lester French, but goes by Lester French.

Q. When have you seen them before? [51]

A. On March 17 and March 18, 1956.

Q. And in what area?

A. In Tacoma and Seattle.

Q. Directing your attention now to March the 17th, 1956, were you on duty on that date?

A. That was Saturday, but I was called to the office, yes, sir.

Q. Were you given certain instructions? Don't say what they were. A. Yes, sir.

Q. And in accordance with those instructions did you do anything? A. I did.

Q. What did you do?

A. Well, first I came to the resident agency in this building at about 2:30 and contacted the other agents, had them ready to prepare to meet a car that was being—that I understood was being under surveillance in Oregon at that time, and——

Mr. Elias: I object and move to strike any testimony of what he understood. Only what he knows as a fact.

Mr. McCormick: It is a preliminary, your Honor.

The Court: Well, I will strike everything [52] excepting that he came prepared to undertake a surveillance of a vehicle pursuant to instructions. Go ahead.

Q. (By Mr. McCormick): And did you pur-

(Testimony of Frank Willard Ralston.)

suant to instructions do something from that time on?

A. We didn't take any action at that time except wait until about 5 o'clock, and went home to dinner and with an understanding that we could be——

Mr. Elias: Object to any understanding, if your Honor please.

The Court: Just to the effect they could be called at their homes.

Q. (By Mr. McCormick): What did you next do? A. My next call came at 8:30.

Q. Did you do something as a result of that call?

A. Yes, sir. It was probably a little after 8:30, 8:35.

Q. What did you do?

A. I contacted the other agents, Mr. Silvey, and instructed him to drive by my house and meet me, and I instructed two other agents to get another car and proceed south on Highway 99.

Q. Who were those other agents?

A. Charles Brautigam and Donald Cummings.

Q. Did you have a destination? [53]

A. We were to meet other cars coming north from Portland.

Q. And did you meet such other cars?

A. Yes, sir.

Q. And can you state where approximately you met such other cars?

A. It would be between ten and fifteen miles south of Tumwater on Highway 99.

(Testimony of Frank Willard Ralston.)

Q. Now, you have mentioned surveillance of a car. Did you have a particular car to look for?

A. Yes, sir.

Q. Will you tell us what car that was?

A. It was a 1955 Buick, two-tone, described as a hardtop convertible, and bearing California license HDA-216.

Q. Had you any information as to how many occupants there were? A. Yes, sir.

Q. What information was that?

A. I heard there were two occupants.

Mr. Elias: Object to the information as hearsay, and move the answer be stricken, if your Honor please.

Mr. McCormick: He has got to give this information to show that he picked a car and had——

The Court: I am thinking about it. [54] I think so I think that he is now describing a vehicle that he was on the lookout for, and that would be part of it, the number of occupants that he understood. On that theory it is admitted.

Q. (By Mr. McCormick): Did such a car come into your vision? A. Yes, sir.

Q. At about what time?

A. It would be within five minutes one way or the other from 10 o'clock.

Q. In what direction was that car headed?

A. Headed north on Highway 99.

Q. What did you do then?

A. I took up surveillance as soon as I could catch up with the other cars, the car passed while I

(Testimony of Frank Willard Ralston.)

was parked on the shoulder, and I had turned around facing north on Highway 99 before it passed.

Q. Did you at any time observe the persons who were in the car? A. Yes, sir.

Q. Will you tell us when and where?

A. I was able to overtake the car that I described a minute ago, and the other cars that were following it just as we came to the Olympia City Limits. We came to a stoplight on Highway 99. These cars were on the [55] outside, or the righthand lane, and drove along the middle lane and had stopped for a stoplight which this car was also stopped at.

Q. Did you then stop next to it or——

A. I stopped alongside of it, yes, sir.

Q. Could you see the occupants?

A. I could.

Q. Can you tell us who the occupants were?

A. Yes, sir. Mr. Weise and Mr. French.

Q. Were you able to see into the car with any facility? A. Yes, sir, I could.

Q. Will you describe anything that came to your attention?

A. I could see that the part of the car back of the front seat was filled with material up to the top of the front seat almost level with the side of the car up to the windows, that would be the foot well or the place between the seats, as well as the area over the back seat.

Q. Could you tell what general character of material was there?

(Testimony of Frank Willard Ralston.)

A. At 2 p.m. on March 17, approximately, that was 1956. I learned through this conversation that a Mr. Weise was a dealer in photographs of an obscene nature; he worked in Los Angeles, and that he had told someone in Los Angeles he was making a trip in which he had his car loaded with the real stuff, as he described it, said that it was not just strippers this time. I learned that on Thursday morning, that would be the 16th of March, Mr. Weise——

Q. (By Mr. McCormick): Pardon me, Mr. Ralston, I think the 17th was a Saturday, so that Thursday morning would have been the 15th.

A. I am sorry. Mr. Weise had departed from Los Angeles [66] with a man whose identity we did not know at that time, and his car was loaded. The car was kept under continual surveillance, it was seen to stop in Oakland, San Francisco, California, at different places, and packages were taken into places.

Q. When you say "different places," can you characterize them any?

A. They were different business establishments, and these establishments were reputedly to be purveyors of obscene photographs and literature. The car had stopped again in Sacramento, California, where a similar action occurred there. It was in Oregon at the time——

The Court: At the time you received the information?

A. At the time I received the information it was

(Testimony of Frank Willard Ralston.)

in Oregon, and approaching—or either approaching or was in Portland. I am not clear on that.

Q. (By Mr. McCormick): Did you have any information as to the physical description of the car?

A. Yes, sir. I was given the license number that I gave you a few minutes ago, plus the make and color, the description of the car. I was—also I had received information that Mr. Weise had sold obscene photographs in Seattle a few months before that time at which time he was investigated, but there was no proof of interstate [67] transportation, and I got all of that in the first conversations in the afternoon of March 17th.

The Court: With the special agent from Seattle that you have already named?

A. Yes, sir. Then at 8:30 or 8:35 I received information that the car was crossing the bridge into Vancouver, Washington, from Portland, Oregon, at that time. It was still occupied by the same two men who had been in it all of this trip from Los Angeles.

Q. (By Mr. McCormick): You stated earlier that you had received information that the car was loaded? A. Yes, sir.

Q. Can you expand that term as to what was meant, or were you given any additional information?

A. I wasn't given any additional information. I noticed when I came up to it I wasn't in position to see the license number that the body of the car was down low on the rear axle like some cars are if one

(Testimony of Frank Willard Ralston.)

leaf of a spring has been removed or when it has a heavy load in it.

Q. Are you testifying that of your own knowledge? A. Yes, sir.

Q. Now, you testified, I believe, a little earlier that you saw certain boxes in the car?

A. Yes, sir.

Q. And was that of your own knowledge? [68]

A. Yes, sir.

Q. Did you receive any information any later that evening of making the arrest?

A. Yes, sir. At approximately 10 o'clock I received information that a complaint had been filed and a warrant had been issued for the arrest of Moe Weise and John Doe.

Mr. McCormick: This concludes, your Honor and counsel, testimony as to probable cause, and I have specified two points, of course, that the witness knew of his own knowledge.

The Court: Do you want to cross-examine now on this what in effect is voir dire?

Mr. Elias: Yes, your Honor.

The Court: You may do so.

Examination on Voir Dire

By Mr. Elias:

Q. You arrested this man, did you not, on the basis that you had been advised that an arrest warrant had been issued, isn't that correct?

A. Partly on that and partly on the information that I had received.

(Testimony of Frank Willard Ralston.)

Q. On the information that you had received that you just [69] got through describing?

A. Yes, sir.

Q. Well, now, you say partly on one and partly on the other. Did you make an arrest in the street without a warrant, or did you make the arrest with the warrant?

A. I didn't have a warrant with me, no, sir.

Q. Did you make it on the basis of the warrant?

A. Yes, sir. That was one basis.

Q. If you hadn't had the warrant you wouldn't have made the arrest?

A. I don't know whether I would have or not.

Q. You would have used that radio a lot before you would have to find out whether you should have or not, would you have not?

A. I probably would.

Q. Are you a lawyer, officer? A. No, sir.

Q. How long have you been an agent with the F.B.I.? A. Fourteen and a half years.

Q. You are familiar with the necessary elements in order to make an arrest, I assume from your answers?

Mr. McCormick: Objection, your Honor. I object to that question, your Honor.

The Court: Overruled.

A. I am familiar with some of them, yes, [70] sir.

Q. (By Mr. Elias): So that when you hesitate to—you indicated you would have hesitated before you would have arrested him if you would not have

(Testimony of Frank Willard Ralston.)

known the warrant was issued, on the basis of some knowledge you have of what is necessary in order to make a valid arrest, isn't that correct?

A. Not necessarily. I might have waited longer to ascertain if he made any deliveries of material either in Tacoma or other places in Washington.

Q. As a matter of fact, officer, you didn't make the arrest, did you? A. Yes, sir.

Q. Pardon? A. Yes, sir.

Q. Did you go up and arrest the two individuals?

A. Yes, sir. I pulled them over to the curb with the siren and red light. I am of the opinion that I made the arrest when I forced them to stop.

Q. When you forced them to stop in the car?

A. Yes, sir.

Q. That is what you term an arrest, is that correct, as far as these two are concerned?

A. Well, it was not completed probably at that time, but I was in charge all of the time that any of the other agents were talking with these men. I was giving—— [71]

Q. J. Edgar Hoover was in charge of you during this same performance?

A. He wasn't present.

Q. Is that the same relation, do you mean, you had to the people that were working there?

A. No, sir. He wasn't near me, and I was in their presence at all times.

Q. You instructed them to arrest the defendants, did you not?

(Testimony of Frank Willard Ralston.)

A. I didn't use that word in telling them to do anything.

Q. Well, I thought you just got through describing how you told them to put their hands up when they were arrested.

A. I told them, but I didn't tell them to arrest them. I said, "We will take them."

Q. Who did you tell to have them raise their hands? Who were those instructions to?

A. Mr. Silvey gave the orders for them to raise their hands. I told him to give the verbal commands.

Q. To arrest?

A. To the prisoners—not prisoners at that time, but to the defendants here.

Q. Did he? A. Yes, sir, he did.

Q. Was Mr. Buchner there?

A. Not Mr. Buchner, Mr. Buchman was [72] there.

Q. Yes. Was Mr. Mitchelson there? That is his correct name? A. Yes, sir.

Q. They say they made the arrest, is that right?

A. I don't know what they said.

Q. You don't know who arrested who there, do you?

A. I didn't say that. I said I don't know what they said.

Q. Well, they just testified they arrested these two individuals. Were they wrong or incorrect in that statement?

(Testimony of Frank Willard Ralston.)

A. Not necessarily. They participated in the arrest.

Q. They didn't say——

The Court: It is getting argumentative now.

Q. (By Mr. Elias): This information that you received from the two agents in Seattle was obtained by radio or telephone.

A. I think all of the information that I gave you concerning the trip was by telephone. We had to have the radio communications.

Q. I am referring to just when this particular testimony we are now talking about.

A. The description?

Q. Of the past record of these individuals, and so forth.

A. Yes. The car and the trip up here, where they had stopped, that was by telephone. [73]

Q. You had never seen these individuals before?

A. No; I hadn't.

Q. The first time you did see them they were driving down a highway? A. That's right.

Q. At no time after you saw them did they ever get out of the car? A. No.

Q. Until you had them arrested?

A. I didn't see them get out of the car.

Q. As far as you are concerned?

A. Yes, sir.

Mr. Elias: That is all, if your Honor please, for the purpose of the probable cause.

The Court: On the voir dire. Anything further on the voir dire?

Mr. McCormick: Nothing else.

(Testimony of Frank Willard Ralston.)

The Court: Go ahead with the direct examination, then.

Mr. McCormick: If counsel has no objection, I would like to use the word "arrest" just as a verbal shorthand.

Mr. Elias: In the absence of it, I have no objection to that. [74]

The Court: I have to act in two capacities here, and I will try to keep that constantly in mind.

Direct Examination
(Continued)

By Mr. McCormick:

Q. After the arrest was made and the defendants' car pulled over to the curb and the defendants left the car, will you then describe what happened in your immediate purview? You may include any directions that you gave to your agents in the presence of the defendants.

A. I parked my car, pulled it out of the center of the street so traffic could pass, and immediately came up to the sidewalk where the two defendants still had their hands raised, and I told them my name and that I was a special agent of the F.B.I. and they were under arrest, and I instructed Mr. Buchman to search Mr. French for weapons, and at the same time I searched Mr. Weise for some weapon.

Q. Did you tell the defendants why they had been arrested? A. Not at that time.

(Testimony of Frank Willard Ralston.)

Mr. Elias: Object to that question, if your Honor please. He can describe what he saw.

Mr. McCormick: That is what I asked.

The Court: That is what he is to do. Describe what you saw, Mr. Ralston.

The Witness: Boxes, carboard boxes of [56] a brown or craft-type paper.

Q. (By Mr. McCormick): Repeat that, please. I am sorry.

A. Brown or craft-type paper.

Q. You have described a stop in Olympia, I believe. Will you tell what then happened?

A. As soon as the green light came on I started faster than the other cars pulled ahead and then into the righthand lane, and then I turned two or three blocks before I knew that the highway turned so I could——

Mr. Elias: Object to what the reason was.

The Court: Overruled. Go ahead.

A. ——and went east from there up a hill to a place where I intersected or came onto Highway 99 again about the City Limits of Olympia.

Q. (By Mr. McCormick): And what then happened?

A. I drove, then, towards Tacoma.

Q. Did you see the other car again?

A. Not for some time. I kept in radio communication with the other cars.

Q. Continue then with what you did.

A. Yes, sir.

Q. You drove towards Tacoma?

(Testimony of Frank Willard Ralston.)

A. Yes, sir.

Q. And what then happened?

A. At one time we stopped because of the radio communication [57] that the car we were surveilling had stopped also.

Q. Did you see the other car at that time?

A. I didn't see it at that time.

Q. And did you thereafter start again?

A. Yes, sir, I did.

Q. And where did you go to?

A. Well, there was another stop there. I stopped and put a red mask over the spotlight of my car.

Q. At approximately where did you do that?

A. At Fort Lewis.

Q. And did you then continue north?

A. Yes, sir. I continued on Highway 99.

Q. Will you describe what happened next?

A. I drove so that I could see the other cars following me in my mirror, came through South Tacoma Way to 38th Street where there is a multiple intersection, and I was in the lane which had continued on South Tacoma Way or Highway 99, and I saw that the other car, the car that we were following, that is, I was in front of it.

Q. The one you were surveilling?

A. Got in the left turn lane so that it would have to go on over a viaduct which would lead to Union Avenue. I continued on Highway 99 to the next intersection and drove through the area known as Nalley's Valley until I came out to Center Street.

(Testimony of Frank Willard Ralston.)

I waited there until I could [58] get radio messages informing me whether or not——

Mr. Elias: Object to that.

The Court: Well, it isn't very important anyway, so go ahead.

Q. (By Mr. McCormick): Will you just tell what you did then, Mr. Ralston, without specifying why you did it.

A. I stopped there until I was convinced that——

Mr. Elias: Objection, your Honor.

The Court: Don't be concerned about that. Just tell us what you did. You stopped awhile and he went on.

The Witness: I turned right, or east, on Center Street.

Q. (By Mr. McCormick): And in which lane were you traveling then?

A. That isn't marked in lanes at that area. I was driving in the right side of the street until we came to Center Street at which place it is marked in four lanes, two traveling in each direction.

Q. What did you then do?

A. I announced to the others in the convoy that we were going to make an arrest at that time.

Mr. Elias: Objection, your Honor.

The Court: Overruled. Go ahead.

The Witness: And determined that [59] all of the cars were in the vicinity where they could assist. Then I pulled in the lefthand lane, or the center lane.

(Testimony of Frank Willard Ralston.)

Q. (By Mr. McCormick): Do you mean the one nearest the center?

A. The one nearest the center of the street, and saw in the mirror that the Buick we were surveilling was directly behind me. I slowed up until I was almost stopped, and that car turned into the right or the outside lane and started passing me on the right side. As it started to pass I crowded it over towards——

Q. Had you at this time issued any specific instructions to any agents under your control?

Mr. Elias: Object to the leading question, if your Honor please.

The Court: Had you or hadn't you, yes or no?

A. Yes, sir, I had.

Q. (By Mr. McCormick): What were those instructions?

A. I told Mr. Silvey who was in the car with me, to give the verbal orders effecting an arrest, and told Mr. Buehman and Mr. Mitchelson in separate cars, and Mr. Cummings and Mr. Brantigam to get in as good a position as they could. Mr. Buehman was directly behind this car, and Mr. Mitchelson was behind him. Mr. Cummings came behind me so that when I pulled over further he would have [60] room to pass my car and get in front of the other.

Q. And is that all the specific instructions, if any, that you gave?

A. To the other cars, I told them to all be ready, that I was going to stop the car at that point.

Q. What did you then do?

(Testimony of Frank Willard Ralston.)

A. I turned the red light, the spotlight on which had the red mask over it, and the siren and crowded the car over so that it would have to go to the curb.

Q. Did it? A. Yes, sir.

Q. You said that you told Agent Silvey to say something, but you didn't specify what it was that you told him to say.

A. I told him to give the verbal command.

Q. Did you hear him say anything?

A. Yes, sir. I heard him tell them to keep their hands where they could be seen and get their hands up.

The Court: He told the defendants to do that?

A. Yes, sir.

Mr. Elias: I object to that testimony and move it be stricken, if your Honor please.

The Court: Overruled. Go ahead.

Q. (By Mr. McCormick): The car which you had been surveilling [61] had been pulled over to the curb? A. Yes, sir.

Q. Did persons get out of that car?

A. Not until agents from the other cars, Mr. Silvey and Mr. Buchman and Mr. Mitchelson were out and opened the doors. They had their hands raised in the car until these agents were there where they could take hold of them if they needed to when they stepped out of the car.

Q. And who got out of the car?

A. Mr. Weise and Mr. French.

Q. Who was the senior agent at the scene?

(Testimony of Frank Willard Ralston.)

A. I was.

Q. Was—to your knowledge, was any independent action taken by other agents or were they acting under your orders?

A. They were acting under my orders. It was a concerted action.

Q. I didn't hear the last.

A. It was a concerted action in which I was directing.

Mr. Elias: Objection to that and move it be stricken, as it is immaterial under whose orders they were acting.

The Court: It may be so, but the answer will not be stricken.

Mr. McCormick: Now, the plaintiff, [62] your Honor, would like to offer testimony at this point for the sole purpose of establishing probable cause as entirely apart from any warrant of arrest, and with the statement to the Court that I am offering it for that sole purpose.

The Court: You may do that.

Mr. Elias: Just a moment, counsel. Excuse me, your Honor, as I understand it now, everything that counsel is going to ask now is objectionable only from the standpoint of probable cause and will not be considered by the Court in the capacity of a fact finding body, is that correct?

Mr. McCormick: That is my understanding.

Mr. Elias: A voir dire examination only?

Mr. McCormick: It should not be considered on the issue of guilt or innocence.

(Testimony of Frank Willard Ralston.)

Mr. Elias: Under those circumstances, then, I won't object as we go along.

The Court: Yes, of course. Thank you. That arrangement is much preferable. I will keep in mind that on this matter now we are concerned only with the matter of probable cause. [63]

Mr. McCormick: I will revert to my regular examination.

The Court: When you come to that point, indicate that you are shifting so we will understand.

Mr. McCormick: Yes, your Honor.

The Court: Go ahead.

Q. (By Mr. McCormick): Mr. Ralston, then what were your reasons for initiating this action at this time whereby the defendants were forced to the curb and taken into custody?

A. The first reason was information that was passed on to me during telephone conversations with other special agents in the Seattle office.

Mr. Elias: I would like to make an objection at this point.

The Court: I wonder if you could make some sort of general objection that would cover the whole matter, and we will consider the thing in careful detail after all the evidence is in. Now, you don't need to proceed that way if you prefer otherwise. I merely make that suggestion.

Mr. Elias: That is what I am trying to think out, if your Honor please. I am [64] to object to any testimony, and I would like a riding objection, so to

(Testimony of Frank Willard Ralston.)

speak, on any information this officer or any officer that he may call in this particular theory, received by radio or by letters or by telephone communications, on the grounds that it is hearsay, any testimony on the probable cause question.

The Court: Obviously anything that he had related to him by other agents or sent to him by mail or whatever, would be hearsay, but, of course, the question is whether or not hearsay is permissible in determining proximate cause which is a point we will discuss at more length at a later time.

Now, in order to keep the record straight, you have a continuing objection, as I understand it, to any evidence which in effect is hearsay as having bearing on a showing of probable cause, and that objection will continue through the examination of this witness or any other witness on the same subject.

Mr. Elias: Thank you, your Honor.

The Court: Go ahead. [65]

Q. (By Mr. McCormick): Now, Mr. Ralston, will you tell us what information you had at the time you made this arrest and from what source you obtained it? A. I obtained it——

Q. You may name the person who gave you the information if you wish.

A. Well, I talked to at least two special agents from Seattle by phone and by radio. Mr. Ciminera was one, and Mr. Charles Heiner, H-e-i-n-e-r, was the other. The first conversation——

Mr. Elias: Would he state when, and so forth.

(Testimony of Frank Willard Ralston.)

A. I initialled 9, 10, I don't see 11—wait a minute, I am out of line. We will go back here (indicating). That is Exhibit 20 down there. 11.

The Court: Is initialled?

A. Yes. 12 is initialled; I believe 13 is not—13 is not; 14 is not; 15 is; 16 is not; 17 is; 18 is; 19 is not, and 20 is not.

Mr. McCormick: May the record show that these boxes are all approximately [85] ten by ten by eight, and that we are now proceeding to examine the different sized packages. Is that satisfactory, Mr. Elias?

Mr. Elias: Fine.

The Court: Now, to summarize the matter, then, up to this point all those packages that you have indicated, or initialled by you, you would describe in the same manner that you did Exhibit 1, is that right, as to what you did with it, and so forth?

The Witness: Yes, sir.

The Court: The ones that are not initialled by you, the exhibit numbers of which you have indicated, were treated in some different manner that we will come to later, is that right?

The Witness: Yes, sir. Now, there is one thing I don't believe I made clear, your Honor. I believe all of the tapes are initialled by me because all of the boxes were sealed by me on the 19th, but I was looking for my initials on the box itself.

The Court: As distinguished from the tape? [86]

The Witness: Yes, sir. Exhibit 21——

Q. (By Mr. McCormick): Are we going to un-

(Testimony of Frank Willard Ralston.)

derstand about Exhibit 21, that it being a different sized package that the same treatment was used, or another treatment?

A. The same treatment. Mr. Weise signed his name to these, and when I was in his presence while he was signing them, I initialled them to verify his signature. On 21; I do not see any initial on 22 or 23; 24; I did initial 25.

Mr. Elias: 24 you did not initial?

A. That is correct. I do not see my initials on 26.

The Court: Here, again, these last named exhibits, the same would apply, the ones that he initialled on the package received the same treatment as that which you described for Exhibit No. 1?

A. Yes, sir. They were the ones that Mr. Weise wrote his name on in my presence.

The Court: All right. Now, go ahead.

Q. (By Mr. McCormick): Mr. Ralston, will you step in front of the Clerk there, and you will find there a number of reels of film, and I will ask you to examine Plaintiff's Exhibit 27, and I will ask you if you have ever seen them before, and if you will please go through this the same way telling us when you saw it before and what the [87] circumstances were as to Plaintiff's Exhibit 27.

A. Yes, sir: I have seen this before.

Q. And where did you see it and under what circumstances?

A. I took this from a box in which Mr. French —on which Mr. French wrote his name.

Q. And how do you tell that is the same film?

(Testimony of Frank Willard Ralston.)

A. I have scratched my initials and the date on the film itself with a sharp instrument, I think a paper clip straightened out.

Q. Is that film in the same physical condition exactly as when you last saw it?

A. No; it isn't.

Q. What difference, if any, is there on it?

A. There were no spools of this type which are used in the projection——

Mr. Elias: Just a moment, your Honor, I wish the witness would keep describing the same exhibit there. We are liable to get mixed up. I noticed that he was going to other exhibits.

The Court: Stay on the one.

A. This was not on a metal spool.

The Court: The film now identified as identification number what?

Mr. McCormick: 27. [88]

The Witness: 27.

The Court: When you first saw it, it was on some other kind of spool?

The Witness: Yes, sir. There wasn't anything on the side there that would keep the film from coming apart if it was handled.

The Court: There was a different type spool?

The Witness: Yes, sir. It was on a plastic spool.

The Court: Other than that, is the film in the same condition as when you first saw it?

The Witness: Yes, sir.

The Court: All right.

Q. (By Mr. McCormick): Examine Plaintiff's

(Testimony of Frank Willard Ralston.)

Exhibit 28, and so on, stating in each case, Mr. Ralston, whether or not the same remarks would be true concerning that film, or if there are exceptions——

Mr. Elias: To expedite matters, counsel, I don't believe he testified when he examined the first one.

The Court: No; he didn't. He didn't cover them in detail as to when he first saw it, the time and the circumstances. All he [89] said was that this was one on which Mr. French had put his initials, his name, or something of the kind.

Q. (By Mr. McCormick): State a little more in detail what relation, if any, that Plaintiff's 27 bears to Mr. French.

A. It was taken from a box which Mr. French wrote his name on, and said that all of the material in that box belonged to him, and that was all that belonged to him in the car.

Mr. Elias: What date?

A. That was—it would depend on whether it was just before or after midnight. It was starting the night of the 17th of March.

Mr. Elias: And where—may I, your Honor?

The Court: Surely.

Mr. Elias: Where?

The Witness: In this building, Room 230.

Mr. Elias: It would be after midnight, the 18th of March, in this building?

The Witness: Yes, sir.

Mr. Elias: Thank you.

Q. (By Mr. McCormick): Now, proceeding,

(Testimony of Frank Willard Ralston.)

then, again, Mr. Ralston, through Exhibit 28, and so forth, will you state what deviations from what you have already said with [90] relation to Mr. French may be the case, or just say the same routine applies?

Mr. McCormick: Is that satisfactory, your Honor?

The Court: It is with me.

Mr. McCormick: Is that satisfactory?

Mr. Elias: Fine.

The Court: How many reels are there?

The Witness: There are 24 or 25.

The Court: Were they all in the same box?

The Witness: Yes, sir; all in the same box; 25 reels, I believe, and they were taken in the box to Seattle, and on the 19th of March after I took them up there I scratched my initials on a number of them. I believe I missed some.

The Court: That is not important. You identify them all as being the same reels, do you?

The Witness: Yes, sir.

The Court: All right. Go ahead.

Mr. McCormick: I am a little hesitant to proceed in that manner, your Honor.

The Court: You do it as you please. [91] I am not trying to interfere. Just get on with it.

Q. (By Mr. McCormick): Will you examine Plaintiff's Exhibit 28, Mr. Ralston, and state if you have seen that film before, and make it as brief as possible?

(Testimony of Frank Willard Ralston.)

A. Yes, sir. I have initialled this film. I saw it before.

The Court: It may be that counsel will concede the identification, or something of that kind. That will save time.

Mr. Elias: If the witness, your Honor, will say that—instead of talking about the 19th and the 17th, if he will say that on the 18th he examined some of those things in this building and it is the first time he saw them, that is all I want. If he says the 19th he examined some of those reels in Seattle, that is all I want. Then from that point, if your Honor please, I can cross-examine or voir dire.

The Court: Go ahead.

Q. (By Mr. McCormick): As to Plaintiff's Exhibit 28, Mr. Ralston, you have seen that before. Where did you see it?

A. Both here and in Seattle.

Q. And what relation, if any, does it bear to the previous [92] testimony in which you gave about Mr. French?

A. It came from the box which Mr. French had identified as his property.

Q. As to Plaintiff's Exhibit 29?

A. That also came from the same box.

Q. If you will merely repeat the same if you have? A. Yes, sir.

Q. As to Plaintiff's Exhibit 30?

A. Yes, sir. This is the same as applies to Exhibit 30.

Q. As to Plaintiff's Exhibit 31?

(Testimony of Frank Willard Ralston.)

The Court: I think we can have Mr. Ralston run through those reels at the recess time. It is going to take a little time to go through 25 reels.

The Witness: The same applies to this.

Mr. McCormick: I think he might well testify after the recess.

The Court: Don't take the time now to go through 25 reels, because he can do it more quickly during the recess. It is just a waste of time to do that, unless you desire it that way, Mr. Elias.

Mr. Elias: Before you put him back on the stand I might go into further voir dire that may save time. [93]

The Court: Go ahead. Do that.

Examination on Voir Dire

By Mr. Elias:

Q. Mr. Ralston, the first time you saw any of these exhibits was in this building, is that correct?

A. That is right.

Q. And you didn't bring them from the automobile? A. No, sir; I didn't.

Q. Now, you say you saw some of them here and some in Seattle. All of those that you saw here did you also see in Seattle? A. I did.

Q. But some of those that you saw here you didn't mark, and those that you didn't you did mark when you got to Seattle?

A. I didn't mark any of these films in this building. I waited until I got to Seattle.

(Testimony of Frank Willard Ralston.)

Q. That was on the 19th?

A. That was on the 19th. I saw only the box and picked up what was in it, but I didn't identify it.

Q. So from the—all of these film were marked in Seattle, is that right? A. Yes, sir.

Q. And do you know where those boxes were from when—on [94] the night of the 17th and the 18th when you saw them in Seattle?

A. Yes. They were located in my office.

Q. Who took them from here to Seattle?

A. I took them.

Q. Had anybody access to those boxes between here and Seattle other than you?

A. Mr. Cummings was with me, Special Agent Cummings.

The Court: He was in the car?

A. He helped me carry them, and his initials are also on this.

Mr. Elias: Thank you.

Direct Examination
(Continued)

By Mr. McCormick:

Q. Before looking at the box there, Mr. Ralston, I will ask you if you have had occasion to make a count of the individual pictures contained in Plaintiff's Exhibit 1 to 26, inclusive?

A. Yes, sir; I have.

Q. And can you tell us approximately how many pictures there were?

(Testimony of Frank Willard Ralston.)

Q. And then what happened?

A. Mr. Buchman raised up a box in the car and said something to the effect that, "You have quite a lot of pictures here, Weise." Then I told him that we were going to take [75] the material from their car and would take them to the office of the F.B.I., and that he had a choice of leaving his car there where it would probably be impounded, or if it was agreeable with him I would have it driven to town and stored in a storage garage where we keep the F.B.I. cars. He said he would prefer to have it that way.

Q. You say "he"; which one?

A. Mr. Weise said he would rather have his car stored than left out on the street where it might be impounded. One of the agents then drove his car, followed me. I drove with Mr. Silvey in the front seat with me, and Mr. Buchman and the two defendants in the rear seat. We came to this building.

Q. Was there any conversation on the way to the station then?

A. Yes, sir. As soon as we got in I told them what they had been charged with, the complaint on which a warrant was issued, and that they had a right to silence and that anything they said might be used against them; that they had a right to consult with an attorney before talking with me.

Q. Did they say anything in that conversation?

A. Mr. Weise said that he knew that, and I don't believe Mr. French said anything. [76]

Q. Did you arrive here at the agency then?

(Testimony of Frank Willard Ralston.)

A. Yes, sir.

Q. What then took place?

A. I instructed Mr. Buchman to interview Mr. Weise and Mr. Silvey to interview Mr. French, and Special Agents Cummings and Brautigam to bring the material from Mr. Weise's car up to the office of the F.B.I.

Q. And did they do so? A. Yes, sir.

Q. I believe you stated that you deputized two agents or told two agents to conduct two different examinations? A. Yes, sir.

Q. Did you thereafter interview either defendant?

A. I participated some in the interview of both. We had two rooms in our office, Rooms 228 and 230 of this building, and there were phones in each room, and I made some phone calls and I talked some with Mr. Weise and—but more with Mr. French than with Mr. Weise.

Q. Will you state anything of the conversation with Mr. French? I realize you can't repeat the conversation word for word, but tell us generally what he said.

A. After checking some notes that Mr. Buchman had written, I asked him if he agreed then that all—that practically all the material from the car belonged to him, and he said it did. [77]

Q. I beg your pardon, I said Mr. French.

A. I misunderstood you. I talked with Mr. French and asked him how much of that material was his, and at that time the car had been emptied

(Testimony of Frank Willard Ralston.)

and all of the material was in Room 230 in which Mr. French was being interviewed. He said he didn't have anything there to amount to anything, just had one box, and all the rest of all that dirty stuff belonged to Weise.

Q. Did he identify in any manner what the material belonging to him was?

A. Yes, sir; he did.

Q. What did he say?

A. Well, he said he just had a few loops, and he described loops as a type of motion picture and designed for peep-show apparatuses.

Q. Did he mention anything about the length of his trip?

A. Yes, sir. He told me that he had come all the way from Los Angeles with Mr. Weise. The car was loaded before he met Mr. Weise. He put in one box and came along with him.

Q. Did he make any statement as to his knowledge of what was in the car other than his own?

Mr. Elias: I object to that question as leading, if your Honor please. He can testify to any statements he made, but the [78] answer counsel wants is obvious.

The Court: No; I don't feel that there is any concern about that. Counsel can always direct the witness' attention to the subject matter. It is a matter of fine point of judgment at times whether this is suggestive or leading or whether it is not. In this instance I would think it is proper. Overruled.

(Testimony of Frank Willard Ralston.)

Mr. McCormick: Would the reporter please read the question?

The Court: The question is, did he make any statement concerning his knowledge of the contents of the vehicle?

Q. (By Mr. McCormick): Other than the material that he owned.

The Court: Other than his own material?

A. Yes, sir; he did.

Q. (By Mr. McCormick): What did he say?

A. He said, in speaking of Weise, he said, "I don't know what the crazy son-of-a-bitch meant. I didn't know he had that dirty stuff in with him until we got to San Francisco." He said, "I gave him hell for it."

Q. Could you tell what he was talking about? I mean, was there anything in your immediate presence that would [79] explain his words?

A. Yes, sir; there was.

Q. Will you state what that was?

A. There was a box of pornographic pictures.

Q. When you use the term "pornographic," what are you referring to?

A. There were contact prints, four by five size, showing men and women in sexual intercourse, both natural and unnatural acts of sexual intercourse.

Q. Now, I will have to ask——

Mr. McCormick: Your Honor, I think for the convenience of all that the witness leave the stand and come down here to examine the exhibits.

The Court: You may do so.

(Testimony of Frank Willard Ralston.)

Q. (By Mr. McCormick): Plaintiff's Exhibits 1 to 51 have been marked and placed on the floor here, Mr. Ralston. Will you now state as you move along the line where you have seen any of those boxes before, and under what circumstances you have seen them? A. Yes, sir.

Mr. McCormick: I think counsel will agree that if two or three successive boxes meet the same classification, may the witness say that is the same story? [80]

The Court: Identify in particular, giving the number of it, and you can generalize as to the rest, if that is possible.

Mr. McCormick: Some of them do not follow.

The Court: Keep your voice up. We are away from the reporter and it may be hard for him to hear.

Q. (By Mr. McCormick): Proceed now.

A. Mr. Weise—with reference to Exhibit No. 1, Mr. Weise told us that practically all of the material that came from his car belonged to him and that Mr. French had nothing to do with it. We asked him if he would want to identify the material that was his, and he agreed, and he wrote his name on this box (indicating). It was after midnight and he dated it "3-18-56," or March 18, 1956, and it would have been between 12:00 and 1:30 a.m.

Also, he initialed this box (indicating), and there are other initials that were placed on it in my presence at that time.

(Testimony of Frank Willard Ralston.)

Q. Have the contents of that box been disturbed since that time, Mr. Ralston?

A. Yes, sir. The box was not exactly in this condition. The boxes were each held shut with a heavy twine, string, or cord. [81]

The Court: Instead of the tape that is now on them?

The Witness: Yes, sir; instead of tape; yes, sir.

The Court: That is the paper tape, I mean.

The Witness: Yes; the paper tape.

Q. (By Mr. McCormick): Will you describe further what, if anything, you did and when you last saw them, and what you did at that time?

A. The following day I took the—one of each top boxes that we have here, to Seattle where it could be used or introduced in the Commissioner's hearing that was held in Seattle on the 18th of March. Then, on the 19th, I transported all of it.

Q. Confine yourself to Plaintiff's 1.

A. Well, I transported that to Seattle where it would be stored in our vault, and at that time I also counted the contents of the box, and when I had completed that I sealed it with this gummed tape. I don't know just how to describe it.

The Court: That is what it is called, gummed tape.

The Witness: There is a smooth gummed tape that was on the box. [82]

The Court: The lighter color, or the tanner of the two, was it?

The Witness: Yes, sir; yellow.

The Court: That is correct, yellow.

(Testimony of Frank Willard Ralston.)

Q. (By Mr. McCormick): How are you able to tell that you put it on there?

A. I counted it, put my initials and "3-19-56" on it.

Q. Was that box out of your care, custody, or control from the time that Mr. Weise signed it until you put on this last-described tape?

A. It was located in the resident agency here and in which we have a special location that not even the janitor in this building has a pass key.

Mr. McCormick: Offer Plaintiff's Exhibit No. 1 in evidence.

Examination on Voir Dire

By Mr. Elias:

Q. When was the first time you saw that Plaintiff's Exhibit No. 1?

A. That was the night of the 17th and 18th of March.

Q. Where did you see that box the first time?

A. In Room 230 of this building.

Q. You don't know whether or not that box came out of that car or not, do you? [83]

A. I didn't see it brought out of the car.

Mr. Elias: Object to it.

The Court: Well, for the time being. We will have to tie that up with other testimony, I assume.

Mr. McCormick: Yes, sir.

Q. (By Mr. McCormick): Will you examine Plaintiff's Exhibit No. 2, and you have stated, and

(Testimony of Frank Willard Ralston.)

to facilitate this matter, perhaps if the witness could examine these boxes and describe any deviation from the norm, so to speak.

Mr. Elias: I have no objection to that in the least. If he will say these boxes were marked by him under the same circumstances as Exhibit No. 1 on that particular night, I have no objection to that.

Mr. McCormick: That would not be correct.

The Court: He can make any exceptions.

The Witness: There were some exceptions. I initialled only those that I saw Mr. Weise sign his name to. These others were kept in my possession, but I didn't witness his initials.

Q. (By Mr. McCormick): Would you tell them, indicating any [84] departure from the norm?

The Court: Let me get this clear, Mr. Ralston, just give us the exhibit numbers now starting with one and going through consecutively the exhibit numbers as to which your testimony would be identical with the testimony you have given concerning Exhibit 1. Will you do that first? Then we will come back and talk about the ones you do not cover.

A. Well, I will start to list those that I didn't initial because there are only about three of them, 2, 3, 4, all of these are the ones that I initialled.

The Court: I understand it.

A. (Continuing): 5, 6, 7. I don't find my initial on box 8.

The Court: Exhibit 8 is an exception, then. Go ahead.

(Testimony of Frank Willard Ralston.)

exhibits you have testified to, namely, 27 to 50, inclusive, did you see any of them at different times and places, or did you see them all at the same time and place or places?

A. I saw them all at different times, but they were all together.

Q. In other words, if you were to testify as to your previous experience with one, would it be identical for the rest or would there be variations for the rest?

A. It would be the same for all of them.

Q. As to Exhibits 27 to 31, inclusive, and 33 to 50, inclusive, those being the ones you have testified to, will you tell us when and where you first saw those films?

A. I saw them in Room 230 of this building on the night [105] of March the 17th, 1956.

Q. And, as I recall your previous testimony, that was quite late at night, is that correct?

A. Yes, sir.

Q. Now, have you been able to ascertain that you did see them at that time and place?

A. They were in a box which I initialled, and I left them in that box locked in our office, and I was the last one to leave. I locked the door, and I came back Sunday and got some of these exhibits which have been put in evidence here—correction, that have been offered here, and I took samples of those boxes like 1 to 22. I took one of those and one of the smaller flat boxes.

Q. We are just talking about the films.

(Testimony of Frank Willard Ralston.)

A. Well, on Monday, the 19th, I took all of the material which had been brought into Room 230, I took that to Seattle personally.

Q. Was it under your care, custody, and control from the night of the 17th-18th and until this described trip to Seattle? A. Yes, sir.

Q. And at what actual time and place did you put your initials on these films?

A. In our Seattle office of the F.B.I. on Monday morning, which would have been the 19th. [106]

Q. Are these Plaintiff's Exhibits 27 to 31, inclusive, and 33 to 50, inclusive, are they the same films you saw a year ago under the circumstances?

A. Yes, sir.

Q. Now, will you describe further what person, if any, of the defendants had any connection with them, and will you state what that connection was?

A. Mr. French told me those film were his.

Q. Did he say where he had gotten them?

A. He said he brought them with him from Los Angeles. He did tell me the name of a studio.

Q. I am concerned solely with the geographical area. A. It was in Los Angeles.

Mr. McCormick: You may cross-examine, counsel.

Cross-Examination

By Mr. Elias:

Q. Did he tell you he brought this to Room 230, or whatever that room was?

A. No, sir; he didn't.

(Testimony of Frank Willard Ralston.)

Mr. Elias: Same objection, your Honor.

Mr. McCormick: I haven't offered them.

Mr. Elias: Excuse me, I thought you had. Excuse me. [107]

The Court: Go ahead. Cross-examine.

Mr. Elias: Nothing further, your Honor.

The Court: That is all, Mr. Ralston.

(Witness excused.)

GLENN E. SILVEY

called as a witness on behalf of the Plaintiff, being first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name and spell your last name, please.

The Witness: My name is Glenn E. Silvey, S-i-l-v-e-y.

Direct Examination

By Mr. McCormick:

Q. You are an F.B.I. officer? A. Yes, sir.

Q. Where are you stationed?

A. Tacoma, Washington.

Q. Were you so stationed there on March 17, 1956? A. Yes, sir.

Q. I will ask you to look at the counsel table across the room, at the second and third persons seated thereat, [108] and I will ask you if you have seen those persons before?

A. Yes, sir; I have.

(Testimony of Glenn E. Silvey.)

Q. Do you know their names?

A. Yes, sir.

Q. Will you name them and indicate which ones they are?

A. Moe Weise is the second man from the front of the table, and James Lester French is the last man at the table.

Q. When did you first see them?

A. On the evening of March 17.

Q. Were you on the evening of March 17 in company with another F.B.I. agent?

A. Yes, sir.

Q. Who was that agent? A. Mr. Ralston.

Q. Did you participate in an incident whereby persons were taken into custody? A. Yes, sir.

Q. Who were those persons?

A. The two gentlemen at the table that I pointed out previously.

Q. Now, commencing with the time when you and Mr. Ralston entered Tacoma, will you describe as well as you can recall, what happened in South Tacoma?

A. Well, we actually entered the City Limits somewhat in advance of the car driven by or occupied by the two men. [109]

Q. Had you seen their car before entering Tacoma?

A. Yes. We first saw their car south of Tumwater approximately ten miles, and followed it up towards Tacoma on Highway 99. We then continued on Highway 99 until we came to the inter-

(Testimony of Glenn E. Silvey.)

section where 38th Street and Union join Highway 99. The car occupied by the two men went north on Union Street and the car in which Mr. Ralston and I were riding, we went around Highway 99, and by way of radio communication we determined they had turned on Center Street towards Tacoma. We subsequently then drove over to Center Street and were again in front of the car driven by the two men.

Q. Now, without relating anything that Mr. Ralston may have said to you, will you describe what actually happened up to the point of arrest or apprehension?

A. As I said, we were in front of the car, and according to radio communication we knew that our other cars were behind the car driven by the two men. We decided that it was time to make the apprehension, and it was, I would say, as I recall, in the ten hundred block on Center Street. Mr. Ralston was driving the car in which I was riding. We were in the center lane of the street. The car driven by the two men came by to pass us on the right-hand side, which would have been the wrong side, ordinarily, and at the time the car came even with us the [110] red light and siren were turned on.

Q. Who turned those on? A. Mr. Ralston.

Q. Go ahead.

A. And I rolled the window down and shouted out the window to pull over, that they were under arrest, and keep their hands where we could see them.

(Testimony of Glenn E. Silvey.)

Q. Did you do that action of your own volition, or did you receive instructions to do so?

A. Well, Mr. Ralston stated that we had better pick them up and better make the apprehension at the time he attempted to pass the plan——

Mr. Elias: Object to the plan.

The Court: Mr. Ralston did give you instructions to that effect?

The Witness: Yes, sir.

The Court: All right.

Q. (By Mr. McCormick): Did the car pull over to the curb? A. Yes, sir.

Q. Now, who got out of the car eventually, if anyone got out?

A. Of the car we stopped, sir?

Q. Yes, sir.

A. Mr. Weise and Mr. French.

Q. Were you later at the F.B.I. office in this building? [111] A. Yes, sir.

Q. That same evening or early the next morning? A. Yes, sir.

Q. And what, if anything, was going on at that time?

A. Well, routine questioning was taking place plus the transferring of the evidence from the automobile to the custody of our office.

Q. And did you question either of the defendants?

A. Yes, sir. I assisted in questioning Mr. French.

Q. And was anything mentioned as to the own-

(Testimony of Glenn E. Silvey.)

ership or split ownership of any of the material that was being brought into the office?

A. Yes, it was. Mr. French stated that he had not known that Mr. Weise had the—what he called "rough stuff" when they left Los Angeles, and stated that he had not known this fact until they arrived in San Francisco, at which time he admonished Mr. Weise about it.

Q. Was any statement—in the course of making the statement you have used the term "rough stuff"? A. Yes, sir.

Q. Were there any surrounding circumstances from which you could deduce what those words meant?

Mr. Elias: I object to that. This man isn't shown to be an expert on "rough stuff." [112]

The Court: No. He may state what, if any, objects were present then which might have some relationship to the remarks.

Q. (By Mr. McCormick): Could you tell what Mr. French was talking about, and if so, tell the court what was that you did understand?

A. I assume——

The Court: Mr. Silvey, just tell us what, if anything, was present that might bear any relation. Don't state your assumption or any inference that you draw about it, just what was there that might conceivably bear some relationship to it.

The Witness: All right, sir. There were cartons which contained pornographic photographs, and

(Testimony of Glenn E. Silvey.)

also cartons which contained photographs of nude women. I felt that he was referring——

The Court: Just leave that off. I will have to draw that conclusion whether that is what he was thinking.

Q. (By Mr. McCormick): Were both of those types of pictures in your presence at the time this remark was made? A. Yes, sir.

The Court: When you speak of the pornographic, [113] do you distinguish between these pictures of nude women and the pornographic ones?

The Witness: Yes, sir.

The Court: What about this pornographic, what kind of pictures were those, generally?

The Witness: Photographs, actually, depicting acts of sexual intercourse between two people.

The Court: All right.

Q. (By Mr. McCormick): Was any other indication made in your presence as to who owned what part of all of this material?

A. Yes, sir. Mr. French stated that he owned the loops, which were the film.

The Court: The movie film on these spools?

The Witness: Yes, sir.

The Court: Go ahead.

Mr. McCormick: Cross-examine.

(Testimony of Frank Willard Ralston.)

A. I believe there are some boxes included in the total that are not here.

Q. An approximation would be all right.

A. There is approximately 2,750 contact prints to each of [95] those first 22 exhibits, and 1,200 to each of the other exhibits, 23 through 26.

Q. If you are referring to the smaller packages, that is 21 to 26? A. Yes, sir.

The Court: Now, to summarize, then, there is how many in the larger packages?

The Witness: Approximately 27 hundred.

The Court: Prints?

The Witness: Prints in each box.

The Court: In each box?

The Witness: In each box, making a total of approximately 59 thousand in those square boxes, or the first 21 exhibits, and approximately 96 hundred—I am including three boxes not there—that would be six thousand in the others.

The Court: All right.

Q. (By Mr. McCormick): Will you look into what has been marked as Plaintiff's Exhibit 51, and I believe you will find in there a book entitled "Nights of Horror." You may find more than one copy. Will you see if you do?

Mr. Elias: What exhibit is that?

Mr. McCormick: It has not yet been marked for identification. [96]

The Witness: Yes, sir.

Q. (By Mr. McCormick): How many copies of that book do you find?

(Testimony of Frank Willard Ralston.)

A. I only find one of that.

Mr. McCormick: May that be marked Plaintiff's Exhibit 52?

Q. (By Mr. McCormick): Have you seen Plaintiff's Exhibit 52 before?

A. Yes, sir; I have.

Q. Will you tell us where and under what circumstances?

A. That was in the material that I first saw in Room 230 of this building on the night of March 17 or the morning of March the 18th. It bears the name of Moe Weise, which the defendant, Moe Weise, wrote on it in my presence, and bears my initials and two other initials, and the date.

Mr. McCormick: Did you wish to look at that book, counsel? I will offer this lot of material at a later time.

Mr. Elias: What are your initials, "FWR"?

The Witness: Yes, sir.

Mr. McCormick: That may be placed in front of the court.

Q. (By Mr. McCormick): Will you examine that box and see if you find one or more copies of a book called "Burnt Fingers"? [97]

A. I find one copy.

Mr. McCormick: May that be marked as Plaintiff's Exhibit 53.

Q. (By Mr. McCormick): I will ask you if you have seen that before, and if you have, the general circumstances?

(Testimony of Frank Willard Ralston.)

A. I have seen it under the same circumstances as I described on Exhibit 52.

Q. Does it bear the signature of Moe Weise?

A. Yes, sir.

Q. Was that written in your presence?

A. Yes, sir.

Q. Will you look and see if you find one or more copies of a book entitled "Education in Submission"? A. Yes, sir. I find five copies of that.

Mr. McCormick: May that entire group be marked as Plaintiff's Exhibit 54?

The Court: Go ahead.

Q. (By Mr. McCormick): Will you describe briefly when and where you saw that before, if you have?

A. On March the 18th, 1956, in Room 230 of this building under the same circumstances, as in these previous books, with the exception that I told Mr. Weise it would be all right for him to just to initial a sample copy of each book where there were more than one, like in this "Education in Submission" by Ray Thorne. He wrote his [98] name on only one copy, but he initialled the other four.

Q. As far as you are aware, then, all five copies fall into that category? A. Yes, sir.

Q. Will you look therein and see if you find a book called "Twin Torment" in one or more copies?

A. Yes, sir. There are five copies of that book.

Mr. McCormick: May that be marked Plaintiff's Exhibit 55.

Q. (By Mr. McCormick): Will you state the

(Testimony of Frank Willard Ralston.)

same things concerning that if you have seen them before?

A. The same thing applies to these five books as it did to Exhibit No. 54. Mr. Weise wrote his name on one copy and I initialled all five copies.

Q. Will you further look and see if you find a book in one or more copies called the "Mistress of Leather"? A. There are five copies of that.

Mr. McCormick: Will you have that marked Plaintiff's Exhibit 56?

Q. (By Mr. McCormick): Will you state when, where, and how you have seen that, if you have seen it before?

A. The same thing would apply to Exhibit 56 that also applies to 54 and 55.

Q. Now, will you look further in Plaintiff's Exhibit 51 and tell me what you find in the box? [99]

A. Well, there are a number of boxes that are approximately two inches by two inches by six inches.

Q. Will you open one of them and see what is in it? A. Yes.

Q. Will you describe it for the record, briefly?

A. This is what we have called a "dildo," a rubber dildo. Looking at it from one side it appears to be the image of a woman, and from the other side the shape of an erected penis.

Q. Will you replace it in the box, please?

A. Yes.

Q. Have you ever seen those articles or similar ones in connection with these defendants before?

(Testimony of Frank Willard Ralston.)

A. I have.

Mr. McCormick: May the entire remaining contents of that box be marked as Plaintiff's 57? That is to say that the box is Plaintiff's 51 and the contents thereof are Plaintiff's 57.

The Court: Put the label on the outside. Designate it as "contents" or something of that kind. That can be done. All right.

Q. (By Mr. McCormick): Have you seen what you have described as rubber dildos in connection with the defendants now before the court? [100]

A. Yes, sir.

Q. And will you tell us when and where you saw them?

A. On the night of March 17, 1956, in Room 230 in a box which Mr. French identified as his property contained in it. It was about two-thirds full of those cartons with the rubber dildos.

Q. Did you say Mr. French or Mr. Weise?

A. Mr. French.

Q. The rubber dildos, I would like to refresh your recollection, to which defendant are you ascribing the rubber dildos?

A. I was mistaken. This is Mr. Weise. He has written his name on this box.

Q. And what conversation did you have with Mr. Weise then about the rubber dildos? Did he say anything about them?

A. I don't recall any particular conversation about them. I can't recall it.

Q. Now, referring, for the sake of brevity, to

(Testimony of Frank Willard Ralston.)

all of the preceding exhibits which you have indicated that Mr. Weise wrote his name and you wrote yours, that is, being the large boxes, the small boxes, and the books, was any statement made by Mr. Weise other than the fact that they were his property?

A. He told us he had brought them all the way from Los Angeles, but he wouldn't say where in Los Angeles that he [101] had gotten them.

Q. Was there any exception to that rule as to the exhibits that you have identified as being signed by Mr. Weise and by yourself? A. No, sir.

Mr. McCormick: We offer Plaintiff's Exhibits which have been so testified to.

Mr. Elias: Object to all of these exhibits, if your Honor please, on the grounds that they have only been– this witness has identified them as seeing them in a room in this building.

The Court: There is not sufficient identification for the moment. I take it you can complete that with other testimony?

Mr. McCormick: The witness now has testified that the defendant here stated he brought them all the way from Los Angeles.

The Court: It would probably be sufficient, but surely there must be someone who actually took these boxes out of the car.

Mr. McCormick: As a matter of fact, there is, your Honor.

The Court: I think, to save any possible ques-

(Testimony of Frank Willard Ralston.)

tion about it, we had better wait until we [102] hear that testimony.

Mr. Elias: Of course, my motion to suppress is going on?

The Court: That basic objection will be continued in all respects whether you mention it or not in any particular.

Q. (By Mr. McCormick): What statement, if any, was made as to intended disposition of these articles by either or both defendants, to your knowledge?

A. I asked Mr. Weise if he had started out on the trip to sell these, and he said, "No; these are all on order. I knew where they were going when I started."

Q. And did Mr. French state anything in connection with the material which you have testified as to?

A. He said at first he just came along for the trip but that he had some loops that he wanted to bring along and see if he could——

The Court: Loops?

The Witness: That is what he called those——

The Court: Those film?

The Witness: Those reels of film.

Mr. McCormick: Would the reporter read back the last few words? He had some loops he wanted to bring along and see if he could—— [103]

The Witness: Dispose of.

Mr. McCormick: Your Honor, might I suggest that I am nearly through with this witness, and if

(Testimony of Frank Willard Ralston.)

your Honor would care to allow the witness to examine these——

The Court: We are very near the afternoon recess. We will take that and go on.

Mr. McCormick: Before the court recesses, may I ask the witness now on the stand, then, to examine Plaintiff's Exhibits 32 to 50, inclusive, and to be prepared to testify when we resume as to which ones he has anything to say about?

Mr. Elias: And, further, your Honor, also as to when he saw each one, in this building or the Seattle building, or both buildings, so we won't have to go back over it.

The Court: Arrange it between you. When you have covered it sufficiently from both standpoints, then we will resume.

Recess subject to call when you are ready.

(Thereupon, a short recess was taken.)

The Court: Proceed. [104]

Q. (By Mr. McCormick): During the recess, Mr. Ralston, have you examined carefully the films, being Plaintiff's Exhibits for identification 27 to 50, inclusive? A. I have.

Q. And I will proceed to ask you a series of questions about them. Will you state which of those you are able to say you have seen before?

A. I have seen and placed my initials on all of them except Exhibit No. 32. I don't find my initials on that.

Q. May I next ask you the next question. Of the

(Testimony of Donald M. Cummings.)

The Court: Are you going to identify this, or offer these items?

Mr. McCormick: I intend to use one more witness, your Honor.

The Court: Go ahead.

Q. (By Mr. McCormick): Are you in a position now to identify those—strike that. Were you present in the agency that night or early morning during interviews with either of the defendants?

A. Yes, sir; I was present in the agency.

Q. Did you hear anything from either defendant which would indicate any split of ownership of all of this material, or in any way that would identify it with either defendant individually?

A. Yes, sir; I did.

Q. Will you state what that was? [124]

A. May I explain that?

Q. Yes.

A. We have two rooms in the resident agency down there. One room was used that evening primarily for interviews, and the other room was used primarily by me in bringing up the evidence and setting it out there. When each of the gentlemen, Mr. Weise and Mr. French, each came into the room, I asked Mr. Weise what property was his and he identified it for me. He placed his signature on the various items that were his, and I recall Mr. French said that all he had were the loops, and he said that all of the loops were his, and by loops he meant the films.

Mr. McCormick: Cross-examine.

(Testimony of Donald M. Cummings.)

Cross-Examination

By Mr. Elias:

Q. Did Mr. Weise say that the rest of the material was his? A. I beg your pardon?

Q. Did Mr. Weise say the material other than the loops was his?

A. As I recall, Mr. Weise identified the material that was his by placing his name on the boxes. There was such an accumulation of it there that he specifically identified almost each and every piece as being his.

Q. And did Mr. French then identify the film strips only, [125] or loops, as you call them, as his?

A. He said that the loops were his.

Q. And from your discussion with these people did you determine they both agreed the loops were French's and the rest of the stuff was Weise's?

A. Yes.

Q. Now, who took those materials from the car, Officer? A. I took them from the car.

Q. Are you the only officer that did?

A. Mr. Brautigam, another agent, was with me. He and I unloaded the car in front of the Post Office Building, down here on 11th Street.

Q. Then who brought them up into the building?

A. We both did. There was such an amount that we had to get a dolly downstairs, and we made two trips to bring it up.

The Court: The two of you together brought it all up, is that right?

(Testimony of Donald M. Cummings.)

The Witness: Yes, sir.

Q. (By Mr. Elias): There wasn't anybody else involved in bringing them up? A. No.

Q. The boxes didn't look like they look now, Exhibits Nos.—those laying on the floor over there, 21 to 26, they didn't look—or don't look the same as they did then? [126] They were wrapped differently?

A. The boxes were tied with a string, as I recall, and there was no tape on the outside of them. Otherwise they were the same.

Q. Were they all sealed, or were some of them opened and some sealed with a string?

A. They all had string.

Q. A number of them were open boxes?

A. I don't recall any open boxes. Let me correct that a little bit. The box that had the dolls in it didn't have any string on it.

The Court: The dolls? Do you mean this item referred to as dildos, or some such thing? Is that the same item you mean?

The Witness: Yes.

The Court: The things in those little green boxes in Exhibit 57?

The Witness: Yes, your Honor.

Q. (By Mr. Elias): And so when they were brought up, did you immediately put your initials on those boxes? A. No; I didn't.

Q. How much time elapsed when you did do that?

A. Well, in the unloading operation I or Mr.

(Testimony of Donald M. Cummings.)

Brautigam, I don't recall which, went and got the dolly to unload the car. One of us remained behind to watch the car, and we [127] loaded the dolly which was on the sidewalk. After loading the dolly we locked the car and both of us took that load up to the resident agency and set the material on the floor and on various desks that were there. Then we went down with the empty dolly and took another load up in the same fashion. At that time both Mr. Weise and Mr. French were being interviewed.

Q. Who cut the strings and took the strings off or opened the boxes?

A. I don't recall. I think perhaps I did on one box. The strings actually were not taken off all of the boxes at that time. Mr. Weise explained that the boxes that were tied in that fashion with strings were all the same, and that——

The Court: Do you mean contained the same material?

The Witness: Contained the same material, so, as I recall, we just examined one box at the time.

Q. (By Mr. Elias): When did the rest of them get changed, the strings came off and those seals put on, do you know?

A. Yes. The following Monday the property was all transported to our Seattle office.

Q. Were you involved in the transportation?

A. Yes; I was. [128]

Q. But the strings were on them when you left?

A. The Tacoma office?

Q. Yes.

(Testimony of Donald M. Cummings.)

A. Yes, sir, and when we went to Seattle we proceeded to examine each and every box. Now, I might point out that on one of the boxes the string was not on it because we had taken the string off and examined it at the resident agency.

Q. Then, you placed your initials on while the strings were still on the boxes, is that correct?

A. Yes.

Q. And up here in this office here?

A. Yes.

Q. And then you took them over to Seattle?

A. Yes.

Q. Where have they been since?

A. They have been in our Seattle office in our evidence locker.

Q. Were you present when they sealed those boxes in the Seattle office?

A. Yes; I was. I examined the contents of each and every box with Mr. Ralston and we resealed them.

Q. With that kind of tannish tape there?

A. Yes; with that tape; that's right.

Mr. Elias: No further questions. [129]

The Court: That is all, Mr. Cummings. You are excused.

(Witness excused.)

The Court: Unless there is some special question raised of identification, I don't see any point in going through with the additional witness, going through the same material, do you?

Mr. McCormick: I will make an offer.

Mr. Elias: With the usual motion to suppress.

The Court: Well, I don't think that unless there is some special feature of it that you want to amplify, there is no use in taking the time to go through all the details again. Go ahead.

Mr. McCormick: I don't want to call Mr. Brautigam then, your Honor.

The Court: Mr. Brautigam's testimony would be merely cumulative of Mr. Cummings' testimony?

Mr. McCormick: As to two points, your Honor, the identification of the items and the statement about "I didn't know he had the rough stuff until we got to San Francisco." [130]

The Court: There is no use of producing that. That is merely cumulative. Call another, please.

Mr. McCormick: The plaintiff now offers Exhibits 1, 2, 3, 4, 5, 6, 7—does not offer 8-9, 10, 11, 12, 15, 17, 18, 21, 25, and those so far are boxes, your Honor, and those are boxes concerning which we have had testimony from both Mr. Ralston and Mr. Cummings.

Mr. Elias: No objection, your Honor.

The Court: They are admitted.

(Thereupon, Plaintiff's Exhibits Nos. 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 15, 17, 18, 21, and 25, for identification were received in evidence.)

Mr. McCormick: Likewise, the plaintiff offers Plaintiff's Exhibits 27—being the film, 27 to 31, inclusive; 32 has been identified by no person and so

we do not offer it; we offer 33 to 50, inclusive. Will the Court rule upon those?

The Court: Do you have any objection?

Mr. Elias: I object to those being admitted, due to the fact that they are not in the same container or in the same box [131] as when these agents originally saw them, and I don't know who transferred them or whether they are the same rolls, and for that reason I hesitate to allow this without further identification, if your Honor please.

The Court: Objection overruled. That will go to the weight and not the admissibility. If it should appear there is something about that, I can consider it under the weight and not the admissibility. Admitted.

(Thereupon, Plaintiff's Exhibits Nos. 27, 28, 29, 30, 31, and 33 to 50, inclusive, for identification, were received in evidence.)

Mr. McCormick: We do not offer Plaintiff's Exhibit 51, being the box there. We do offer Plaintiff's 52, 53, 54, 55, and 56, being the groups of books there, and we offer 57, being the so-called dildos or dolls.

Mr. Elias: No objection.

The Court: All of those exhibits last referred to are admitted.

(Thereupon, Plaintiff's Exhibits Nos. 52, 53, 54, 55, 56, and 57 for identification were received in evidence.) [132]

Mr. McCormick: The plaintiff now requests permission to show the Court Plaintiff's Exhibits—well,

I request permission to open and offer to the Court Plaintiff's Exhibit No. 1, which is the first box here.

The Court: You may do that.

Mr. McCormick: May the record show I am cutting open the box and handing to the Court, Plaintiff's Exhibit 1—Exhibit 21.

(Thereupon, Plaintiff's Exhibits 1 and 21 were handed to the Court.)

The Court: All of this material is more or less similar?

Mr. McCormick: Yes, your Honor.

The Court: There is no need of looking at all of it.

Mr. McCormick: Plaintiff's Exhibit 21 is markedly different. If the Court please, we had planned originally to show the Jury some five out of the 25 films. I feel that I should like to show to the Court motion picture, Plaintiff's Exhibit 27.

The Court: You may do that.

Mr. McCormick: And 29. It will be necessary to remove the Court's marking [133] temporarily.

The Court: That may be done.

Mr. Elias: This is what number here?

Mr. McCormick: Exhibit 27.

(Thereupon, a motion picture, being Exhibit No. 27, was displayed to the Court.)

Mr. McCormick: We will now show Plaintiff's 29, your Honor.

(Thereupon, a motion picture, being Exhibit No. 29, was displayed to the Court.)

(Testimony of Glenn E. Silvey.)

Cross-Examination

By Mr. Elias:

Q. When did you first see the defendants so that you could recognize them, Officer?

A. So that I could recognize them? [114]

Q. Yes. When you arrested them?

A. Yes.

Q. Who was driving the car you were in?

A. Mr. Ralston.

Q. Mr. Ralston? A. Agent Ralston.

Q. And you picked up that car the first time where?

A. Oh, approximately ten miles south of Tumwater, Washington.

Q. And Mr. Ralston was driving that car all the way in to where the arrest took place?

A. Yes, sir.

Q. The first time you could see them is when you stopped and arrested them?

A. Well, now, you asked the first time?

Q. To recognize them.

A. Yes, sir; but at Olympia, Washington, we passed very close to the car, and because of the differences in appearance of Mr. French and Mr. Weise, I could determine that they were different individuals at the time we arrested them, but I did not know which was which, which was Mr. Weise or Mr. French, until they gave their names at the time of the arrest.

(Testimony of Glenn E. Silvey.)

Q. And when you passed them, do you mean you recognized them as the two men sitting here if you hadn't seen them since that time? [115]

A. Yes.

Q. Where were they when you recognized them, as you went by going down the highway?

A. Yes, sir.

Q. How fast did you pass them?

A. We were aside of them at a stop sign in Olympia.

Q. Were you sitting on the right-hand side?

A. Yes.

Q. Where was their car, on the right or left?

A. On the left.

Q. On the left? A. Yes, sir.

Mr. Elias: I believe that is all.

The Court: That is all, Mr. Silvey. You are excused.

(Witness excused.)

The Court: Call another witness.

Mr. McCormick: Call Agent Cummings. [116]

DONALD M. CUMMINGS

called as a witness on behalf of the Plaintiff, being first duly sworn, was examined, and testified as follows:

The Clerk: State your name and spell your last name.

The Witness: My name is Donald M. Cummings. The last name is spelled C-u-m-m-i-n-g-s.

(Testimony of Donald M. Cummings.)

Direct Examination

By Mr. McCormick:

Q. You are an agent of the F.B.I., Mr. Cummings? A. Yes; I am.

Q. Were you on March 17, 1956?

A. Yes, sir; I was.

Q. Where were you stationed?

A. My station at that time was Tacoma, Washington.

Q. I will ask you to look at the two gentlemen who are seated at the counsel table on the far side from me, that is the second and third gentlemen, and I will ask you if you have seen them before?

A. Yes, sir; I have.

Q. Do you know them by name?

A. Yes, sir; I do.

Q. Will you state what their names are? [117]

A. The first gentleman behind Mr. Elias is Moe Weise, and the gentleman benind Mr. Weise is Mr. French, Lester French.

Q. When and where did you first see them, these gentlemen?

A. I first observed these gentlemen when I was a member of the arresting party at about Center and M Streets on Center Street in Tacoma on March the 17th.

Q. At about what time of the day or night?

A. I believe it was about 11:30 at night.

(Testimony of Donald M. Cummings.)

Q. And did an apprehension of certain persons take place at that time and place?

A. Yes, sir; it did.

Q. Was a car connected therewith?

A. Yes, sir; there was.

Q. Will you describe that car?

A. Do you mean the car that they were in?

Q. Yes, sir.

A. It was a late model Buick, red and with a cream top, a hardtop convertible model, with California license on.

Q. And you stated that you were a party of the arresting team? A. Yes.

Q. What persons were arrested at that time and place?

Mr. Elias: Object to it—withdraw the objection. [118]

The Court: Go ahead.

The Witness: Mr. Weise and Mr. French were arrested at that time.

Q. (By Mr. McCormick): Now, after the individuals concerned were taken into custody, what was your job? What were you directed to do?

A. I appeared or I was on the scene at the time of the arrest, and Mr. Ralston, another F.B.I. agent, was also there, and he instructed me to drive Mr. Weise's car down to our office.

Q. That is in this building?

A. Yes; that is in this building.

Q. What further did you do?

A. I drove the car down to the building, and

(Testimony of Donald M. Cummings.)

then I unloaded certain boxes that were contained in the automobile.

Q. I will ask you now to step down from the witness stand, Mr. Cummings, and to come over and examine Plaintiff's Exhibits 1 and on up, and as you go down the line, if you have seen any of those boxes before, will you so state? In other words, if a particular box you cannot identify, just omit that in your number. A. Box No. 1.

Q. Now, I will ask you specifically about box No. 1. I will ask you what relation that box bears to your previous testimony? [119]

A. Box No. 1 is one of the group of boxes that were contained in the vehicle that I carried up to our office.

Q. And how can you tell at this time that that is one of the boxes?

A. Because it bears my initials.

Q. Now, will you examine them from there on in order? If the same remark would be true of each box as you call off the number, make no further remark. If there is some deviation from that what you have already stated, then, please explain it.

A. Box No. 1, No. 2, No. 3, No. 4, No. 5, No. 6, No. 7, No. 8, No. 9, No. 10, No. 11, No. 12, No. 13, No. 14, No. 15, No. 16——

Q. I beg your pardon. I have gotten lost. No. 13?

A. No. 13, No. 14, No. 15, No. 16, No. 17, No. 18, No. 19, No. 20, No. 21, No. 22, No. 23, No. 24, No. 25. I don't find my initials on No. 26.

Q. So that you can make no remark about 26?

(Testimony of Donald M. Cummings.)

A. Right.

Q. All right. Now, will you proceed and——

Mr. McCormick: I am afraid we are faced with the same situation, your Honor. Mr. Cummings was not present when Mr. Ralston was examining those films. I don't want to delay the proceedings, but it was not possible [120] for him to examine the film at that time. He was not in the building.

The Court: Do you mean the same arrangement about identifying the film?

Mr. McCormick: Yes, your Honor.

The Court: Let him describe in general what such identification he can make, and it may be that counsel will be satisfied with that.

Q. (By Mr. McCormick): Now, on the night in question, if I understand your testimony, you removed from the car boxes from the car of the defendant, boxes of the two different types that we have here on the floor which run Exhibits 1 to 25, inclusive? A. Yes.

Q. Those of that series that you have identified? A. Yes.

Q. Now, did you in addition take anything else out of the car?

A. Yes. There were other boxes that I haven't as yet identified, and other material. There was also a briefcase, I believe.

Q. Will you describe as well as you can recall, what other material you took out of the car?

A. There was a box with some movie films [121] in it.

(Testimony of Donald M. Cummings.)

Q. Could you approximate the number of film?

A. I believe there were about 25.

Q. What did you do with those films?

A. I beg your pardon?

Q. What did you do with those films?

A. I took them up to the office and I identified them by placing my initials on the strip of film, at the end of the film strip.

Q. Please keep your voice up.

A. I believe it was at the end of the film strip that I scratched my initials on those.

Q. Was there any other material of different character removed from the car by you?

A. Yes, sir. There was in another box, there were some books. Those appear to be the books on the table there (indicating), and there was a box——

The Court: What are the exhibit numbers, please?

Mr. McCormick: 52 to 56, inclusive.

The Court: Thank you.

Mr. McCormick: May the witness be shown Exhibits 52 to 56, please?

Q. (By Mr. McCormick): Will you look at the fronts of those books and see if you have seen them, or books like them?

A. I have seen 52; I have seen 53; I have seen 54; I have [122] seen 55, and I have seen 56.

Q. Are you in a position to state that you have seen those books or books like them?

(Testimony of Donald M. Cummings.)

A. I have seen these books. These were the books that were in a box that I took from the car.

Q. How do you know those are the books?

A. They also bear my initials.

Q. And they were taken from the car under the same circumstances? A. Yes.

Q. Did you take anything else out of the car?

A. I took a—there was the box that I had previously mentioned. It appears to be that box over there (indicating).

The Court: Exhibit number what?

Mr. McCormick: 51, your Honor.

The Court: All right.

The Witness: In which there were some——

Mr. McCormick: May the witness be shown Exhibit No. 51.

The Court: He can see it from there. That is the box, is it?

The Witness: Yes, sir.

Q. (By Mr. McCormick): Will you look at the contents which have been designated as Plaintiff's Exhibit No. 57, and [123] tell us if you have ever seen that material before?

A. The contents of this box?

The Court: Yes; the contents of the box, Exhibit 57. The box itself is 51.

The Witness: Yes, sir. This appears to be the material that was in the box at the time I removed it from the car.

Q. (By Mr. McCormick): Were you present during any interviews which took place——

moronic, to every manner of indecent passion, crime, and violence.

The books that are in evidence similarly [143] are not only of a lewd and lascivious nature, but sadistic as well. They are calculated to incite a moronic reader to brutal and vicious conduct, making that material clearly within the law prohibiting the interstate transportation of lewd, lascivious, and filthy material. The quantity involved here is so great that it would be just trifling with common sense to suggest that these were souvenirs brought home from the war, or picked up on the Rue Pigalle, or something of the kind. I have been around a little in my time, and certainly don't hold myself out to be a paragon of virtue, or anything of the kind, but it would just be beyond all reason to suppose that such a quantity of this kind of material was being transported for any purpose other than sale and distribution.

The film is not, perhaps, as objectionable as most of the photographs, but nonetheless, hardly could be thought to be a work of art or intended for any purpose other than to appeal to the lewd, lascivious, vicious side of men and women that it is to [144] the interests of organized society to keep in control. Accordingly, I think the film comes clearly within the legal definition of lewd, lascivious and filthy. While there may be various degrees in such category, it is my judgment that all of this material, excepting some of the photographs in that Exhibit 1, are clearly within the ban of the statute.

The intent, transportation, and the filthy, lasciv-

ous, and lewd character of the material are all in my judgment fully established. All of the necessary elements of the crime as to both defendants and as to both counts are clearly established beyond any reasonable doubt in my mind.

The only question to be concerned with in the case is as to the legality of the seizure of the film and pictures and of the arrest of defendants. I take it that you have presented to me all of the citations that you have been able to find that bear on the question, and have argued the matter as fully as the subject requires.

Without dilating in great detail on the [145] cases, I will say this: The only two cases that are strongly supportive of the motion to suppress are very old cases, 1884, I think one of them is, and the other 1887, or something of the kind; but even those cases can be distinguished. They involved information given by a volunteer civilian who was not a law enforcement officer, and in other respects the circumstances can be distinguished. I think that those cases are not very persuasive authority at the present time in view of a number of more recent Supreme Court decisions, particularly the recent Costello case in 350 at 359.

In the Costello case the only question presented, as stated by the Court itself, is: "May a defendant be required to stand trial and a conviction be sustained where only hearsay evidence was presented to the Grand Jury which indicted him." The United States Supreme Court squarely and without

equivocation answered that inquiry in the affirmative.

That is not, of course, the precise question in the present case. We have a [146] somewhat different situation presented; however, I have examined the provisions of the Constitution pertaining to Grand Jury action and indictment and compared them to the requirements of probable cause for arrest and search and seizure, and cannot discern any substantial difference. In other words, the probable cause which is sufficient for indictment by a Grand Jury, as far as I can see, is at least no less than the probable cause required for arrest and search and seizure by law enforcement officers.

Logic would suggest that a less formal and certain showing of probable cause would be required for an arrest than would be required in the case of an indictment, because an indictment is considered in a proceedings where presumably there is no urgency and less necessity of immediate action than in the case of arrest, search, and seizure. The Grand Jury can consider the evidence presented at its ease, dispassionately, and objectively, without the necessity of reaching immediate decision; whereas many times in the case of an arrest, as in the present [147] instance, there was need of taking some action promptly to apprehend defendants, and to seize the objectionable material before it could be disposed of. I would think that if there be any distinction between the two situations, that less information and information of a less direct and certain character would be required in order to justify

a warrant of arrest than would be required to justify an indictment. In any case, there certainly is no room for supposing a greater degree of proof is required in the case of an arrest or a seizure than would be in the case of an indictment.

Now, in the Costello case the Supreme Court has said squarely and unanimously with respect of that question, that an indictment can be grounded wholly on hearsay evidence. Let us lay that alongside of our situation here. At the time of the arrest of the defendants and the seizure of this material, the information available to Mr. Ralston came not from anonymous or civilian sources, but from representatives of the Federal Bureau of Investigation. In other words, he had [148] information from official and presumably reliable sources, which might not be the case if just any Tom, Dick, or Harry came along and gave information. Ralston had information from reliable sources which, if true, and if believed, would give ample grounds for sustaining a finding of probable cause.

Now, to put the same point another way to make it clear, if Ralston personally knew from firsthand knowledge rather than hearsay that Wise was a dealer in pornographic pictures and literature; that he had picked up a large quantity of material from a known source of pornographic material in Los Angeles; if he knew of his own knowledge and had seen him drive from this place to various other places likely for distribution in California and in Oregon; if he knew that the car was heavily laden with bundles of material taken from a source of

pornographic literature; and if he knew and had seen him drive across the state line at the Columbia River Bridge at Vancouver; if Ralston had all that information from his personal observation, I [149] can't imagine that anyone would suggest that there wasn't probable cause for believing that the defendants were guilty of this offense with which they are charged here.

The problem in this case, then, as I see it, is whether Ralston could have legally sufficient probable cause by reason of acquiring the information hearsay from the reliable sources of Federal law enforcement officials rather than by his own direct observation and knowledge. I think the Costello case answers that question in the affirmative.

However, if it be supposed that the precise point has never been decided, and it may well be so, I can't imagine that in this day and age Federal law enforcement of interstate offenses would be confounded by a holding requiring that in order to procure a warrant of arrest or of search, that the agent applying for the warrant must have direct, personal knowledge of the essential elements of a suspected criminal offense. Modern crime has gotten to be a national enterprise on enormous scale, frequently [150] crossing state lines, and if in order to have apprehended Mr. Weise and Mr. French here in the State of Washington it would have been necessary for the several different agents that had knowledge of these various circumstances related by Ralston as having been furnished him by these agents, if it were necessary for all of them to come

up here or come before some Commissioner somewhere and relate in firsthand detail their firsthand information about it, why, of course, it would be utterly impractical and preposterous. Law enforcement would be unduly and unnecessarily hamstrung by such an impossible rule.

When a clear violation of criminal law is shown, there is a tendency to judge the validity of the arrest and seizure by hindsight, and I am well aware of that. One in my position has got to keep very clearly in mind that that is not a proper thing to do. It is the philosophy of our Constitution and of our law, particularly as interpreted in the Federal Courts, that the best way to ensure the safeguards of the Constitution to the law abiding, to protect the citizenry [151] from unlawful searches and seizure, to protect them from unlawful arrests without warrant issued on probable cause, is to require that the full legal amenities be guaranteed to the law violator. I would not have the slightest hesitancy, in spite of my distaste for the activities of the defendants, in suppressing the evidence, which would in effect, I suppose, dispose of the case, if I thought it should be suppressed. I have on other occasions, as counsel may know, readily suppressed evidence where it was not properly procured. I don't think that is the case here. I think the evidence was properly procured and the arrests properly made, and, accordingly, it will be and is my finding that the defendants, each and both of them, are guilty of the offenses charged in the indictment, and I now so find.

Mr. McCormick: I might remark that parenthetically your Honor is undoubtedly aware the motion pictures form Count Two of the indictment.

The Court: Yes, I have that in mind.

Mr. McCormick: The plaintiff at this time finds himself in a peculiar position. I manifestly cannot ask your Honor to rule at this time upon the purpose for which these films were taken across state lines. I do not wish to protract this matter unduly. Your Honor, of course, is aware of the statutory rebuttable presumption if five or more articles of this type are taken across the state lines. I don't wish to show three [134] more films.

The Court: There isn't any need of it. I think I get the idea from what I have seen already. At least at this time, if there is any need of any further showing, they are now in evidence and may be shown later. Can you go forward and call another witness?

Mr. McCormick: We have no further witnesses, your Honor. I would request that the Court examine one of the objects of Plaintiff's Exhibit 57 now in evidence, if the Court has not already had a close look at it.

The Court: I think I have it sufficiently in mind, but if you will hand me one, please.

(Thereupon, the Court examined certain of Plaintiff's Exhibit No. 57.)

The Court: I have done that.

Mr. McCormick: And the various books which have been placed in evidence, Exhibits 52, 53, 54,

55, and 56. They, of course, can only be evaluated by your Honor reading certain portions as may seem appropriate.

The Plaintiff rests.

The Court: Well, I tnink I can glance [135] at these at another time. I don't think it would be necessary to read them all. Do you feel so, counsel, that you want me to read any substantial portion of these?

Mr. Elias: I just don't know, your Honor. I haven't seen them myself. I don't know what to say.

The Court: I will glance through them at the recess of the court, and if there is anything especially you want to call my attention to, or to ask me to examine in connection with them, I will. All right.

Mr. McCormick: The Plaintiff rests, your Honor.

Mr. Elias: If your Honor please, this has moved a little faster than I thought it would, and it is now 4:15. I wonder if your Honor would consider recessing at this time until tomorrow morning so that I can have a little more opportunity.

The Court: As an accommodation to you, I most certainly would.

Mr. Elias: I would appreciate it, your Honor.

The Court: We will recess until 9:30 [136] in the morning.

(Thereupon, at 4:15 o'clock p.m., the court recessed to reconvene the following morning, Tuesday, February 6, 1957, at 9:30 [137] o'clock a.m.)

Proceedings

(Thereupon, at the hour of 9:30 o'clock a.m. Tuesday, February 6, 1957, the further following proceedings were had, to wit:)

The Court: Are you ready now, Mr. Elias?

Mr. Elias: Yes, your Honor. As I understand it the Government has just rested?

The Court: That is correct.

Mr. Elias: I would like to renew my motion to suppress for the same reasons as previously stated and one additional; that the complaint upon which the warrant of arrest was based indicates in the affidavit of Charles N. Hiner as follows: That these various things were transported across state lines "in interstate commerce for the purpose of sale and distribution of obscene, lewd, lascivious, and filthy matter of an indecent and immoral character, to wit packets of pictures of a pornographic nature."

That is the entire substance of the affidavit of the Federal Bureau of Investigation agent before United States Commissioner Burns in Seattle upon which the Commissioner relied in issuing the arrest warrant. [138]

That affidavit on its face is insufficient, as it does not state any facts but mere conclusions drawn by an agent. The Commissioner had no facts in front of him from which he could determine from the affidavit if there was a probable cause to do anything.

Obviously, the Commissioner could not read the mind of Charles N. Hiner, and I believe it is

matter of law that the affidavit should contain sufficient facts upon which the Commissioner could determine that there was probable cause to issue this warrant of arrest.

The one additional thing I would like to do, if your Honor please, and I believe counsel has no objection, would be to withdraw that particular complaint of Charles N. Hiner's, or not withdraw it, but have that particular complaint with Charles N. Hiner's signature of United States Commissioner Burns admitted in evidence.

The Court: Well, it may be done. Of course, it is an official part of the record in the case having been filed here, but if [139] you think it desirable to make it an exhibit as such——

Mr. Elias: That is what I had in mind.

The Court: If you think that is desirable, there is no reason it can't be done, and what I would suggest is in that case that you make a photostatic copy of the complaint and the warrant of arrest and make those—those photostatic copies can be made exhibits under the next available numbers.

The Clerk: Defendants' Exhibit A, your Honor.

The Court: Defendants' Exhibit A would be the complaint, and Exhibit B would be the warrant of arrest. That can be done at your convenience to complete the record, and deemed made a part of the record as of now.

Mr. McCormick: That is agreeable, your Honor.

The Court: All right.

Mr. McCormick: May I be heard for a moment?

The Court: Certainly.

Mr. McCormick: I think we have discussed [140] all of the previously mentioned grounds. Mr. Elias bases his last mentioned ground, apparently, on the fact that only conclusions were pleaded, in a manner of speaking, in the complaint. Had Mr. Hiner said, as was the case, I believe in the case of State vs. Eberhart cited in my brief where the prosecuting attorney said, "That man is guilty of Grand Larceny," had Mr. Hiner said in his complaint, "I think Moe Weise and John Doe are guilty of a violation of 18 USC 1465," that would have been pleading a legal conclusion.

As it is, in the language of the complaint, Mr. Hiner, in however cursory a manner, and we agree that they might have been expanded, did plead operative facts.

I just want to go on the record as opposing Mr. Elias' conclusion in that respect. He stated operative facts. They may not have been expanded as much as they might have been.

I have nothing further.

The Court: Well, for the moment, I am going to deny the motion again, as I have, and allow you to offer any evidence that you [141] desire to offer. Then I will consider the whole subject.

Mr. Elias: At this time the defense rests.

The Court: Very well. It is obvious that the case hinges on the validity of the arrest and of the seizure of the alleged obscene material in evidence, at least it seems to me at this time. I would be glad to have you indicate any other phases of the

case that you wish me to give particular thought to, Mr. Elias.

In the trial of a non-jury criminal case I try to keep constantly mindful of the presumption of innocence, the necessity of proof beyond a reasonable doubt, and my duty to weigh all the evidence that is presented in the light of those principles.

If we assume that the arrest of the defendants was lawful and that the seizure of the film and pictures in evidence was lawful, I can't see any room for any doubt of any kind, reasonable or otherwise, concerning the existence of the elements necessary for a finding of guilt as to both defendants on [142] both counts.

I have examined some of the material, samples of the material, in these exhibits. Some of the material might very well not be deemed lewd, lascivious, or indecent within the meaning of the law, particularly some of that in Exhibit 1. Some of the items, while not in particularly good taste, are hardly of a character to be deemed obscene by the standards of this day and age. The general standards of our people I think are the standards by which we must judge this. Some of the pictures in Exhibit 1 are hardly more objectionable than the pictures frequently seen on calendars, and such like.

However, a great mass of the other material is so filthy and objectionable from any conceivable standpoint that there is hardly any room for question but what a very considerable portion of this material is highly lewd, lascivious, obscene, and filthy; inciting the viewer, particularly if a little

There is one question in my mind, and I will hear you on this, Mr. McCormick, whether because the evidence indicates that French was only interested in the movie reels and had no ownership interest in the material referred to in Count I, can he be found guilty [152] of Count I, or Weise guilty of Count II of the indictment?

Mr. McCormick: If your Honor please, I had, of course, prepared jury instructions, and I can support my position little better than by perhaps referring to them in the manner of a trial brief. My instruction, and I am quoting now, which I prepared for your Honor, "You are instructed that if you find as to either Count of the Indictment that James Lester French aided and abetted Moe Weise, or Weise in the alternative, that Moe Weise aided and abetted James Lester French in the commission of the unlawful act charged, you may find each individual committed the act in question himself. 18 U. S. Code 2.

"You are further instructed that to aid and abet means to in some sort associate in the venture; to participate in it as something one desires to bring about; to seek by one's action to make it succeed." Citing U. S. vs. Peoni, 100 Fed. 2d, 401; Nye and Nisson vs. United States, 336 U. S., 613, at 619.

Further, "One who with knowledge of the [153] commission of a crime assists in its execution, is an aider and abettor." Citing Pearson vs. United States, 192 Fed. 2d, 681.

Further, "You are instructed that it is not neces-

sary for one who aides and abets to have a financial stake in the outcome of crime, and, conversely, that it is not a defense to aiding and abetting to show that no profit did or was expected to inure to the aider and abettor." Citing Backun vs. United States, 112 Fed. 2d, 635; United States vs. Moses, 122 Fed. Sup., 323.

The Court: That is sufficient. I have that in mind. Mr. Elias, do you want to be heard on this phase of it?

Mr. Elias: I think your Honor has it exactly in mind as I had it in mind. I think that is more a matter of——

The Court: Well, under the aiding and abetting statute, clearly it is a matter of fact and not of law. I think that under the circumstances, particularly the admissions of the defendants after their arrest, to the effect that French learned before they left California of the fact that the "rough stuff," [154] as he put it, was being transported; the fact that the two of them went together, traded off on driving the car and assisting in the transportation, I think a reasonable inference is that they were jointly engaged in this enterprise to one extent or another with respect of all the obscene material in the car. Accordingly, I think a finding as previously stated of guilt of both defendants as to each and both of Counts, I and II, is established beyond a reasonable doubt by the evidence.

The defendants are found guilty as charged, and are now remanded to the custody of the Marshal.

Mr. Elias: May I address the Court?

The Court: Yes, you may.

Mr. Elias: I wonder if it would be possible for the Court to consider sentencing at this time?

The Court: Yes, it would be possible. It is possible.

Mr. McCormick: Mr. Elias and I have considered certain matter which the United States Attorney would feel would be materially [155] helpful to the Court. Mr. Elias is willing to stipulate, and his clients are willing to stipulate as to the existence of that material. From that standpoint, the United States would be satisfied.

We have nothing further to offer, although, of course, the Probation Officer——

The Court: I am very loath, Mr. Elias, to sentence without a pre-sentence report. It is in fairness to the defendants as well as to myself and to the public whom I represent here, I feel that I should have as much information in any given case as I possibly can. As a matter of fact, I always feel that I wish I had more than even the considerable amount that is given me in a pre-sentence report.

It is a self-serving declaration, but I really take the matter of sentencing very seriously, and I expend a lot of thought and concern and worry on it.

I presume you want the defendants sentenced today mainly to save yourself a trip?

Mr. Elias: No, your Honor. They are from Los Angeles, as your Honor probably [156] knows, and your Honor also probably realizes there will be an appeal, and I think that the facts that are necessary

to be brought before the Court can very well be brought before the Court right now.

The Court: It is quite possible that is so. I think what I will do is remand the defendants to the custody of the Marshal and give the matter attention this afternoon at 1:15, or later in the day if that would accommodate you. I would like some further opportunity to find out more about these defendants than I now know. The maximum penalty in this case is five years and $5,000, something to that effect, on each Count, so they are subject to sentences of up to ten years and $10,000 fine, and that is not a matter to be lightly considered, and I want to know something about them and their background, their previous activities, a good deal more than I know at the moment about them, before I pronounce sentence.

Mr. Elias: Would the Court consider having them remain on bond until such time as the sentencing? [157]

The Court: The invariable practice in this court, Mr. Elias, has been since time immemorial remanding to custody on conviction. It is a practice that I think is very salutary, and I dislike very much to allow it in one case and not allow it in another case, because if I do I am getting into a situation where I am going to be preferring one individual to another, and I certainly try to avoid that. Many times very appealing situations are presented to me, and it is with some difficulty that I must decline. I will require they be remanded to the custody of the Marshal. However, I will consider seeing what ma-

terial we can get together by 1:15 and then consider it in the meantime.

If you want you may submit the material that you think will be sufficient. You can both come into chambers, if you want, and tell me about it, and I will consider then whether I think it is sufficient for my purposes.

We will recess now.

Mr. McCormick: There are one or two [158] other points which I would like to discuss in open court.

The Court: You may.

Mr. McCormick: As your Honor knows, 18 U. S. Code 1465 further provides——

The Court: For destruction. It is so ordered.

Mr. McCormick: Now, may the Federal Bureau of Investigation be—they maintain a cross-file laboratory in Washington, D. C. May your Honor's decree provide that this material be turned back to the Federal Bureau of Investigation for destruction of such portions thereof as are not required for the central laboratory in Washingtoin, D. C., something to that effect?

The Court: Well, do you have any objection to that?

Mr. Elias: I have no objection.

The Court: Very well.

Mr. McCormick: Further, as Mr. Elias has indicated, he wishes to appeal the matter. May it be stipulated, Mr. Elias, then, that the destruction shall be without prejudice to your right of appeal but

that the matter [159] will be stipulated for all appellate purposes to be obscene, is that satisfactory?

Mr. Elias: Yes, that is satisfactory because this appeal is based entirely on the law.

The Court: You had better recite that in an order. Put the stipulation in an order so there will be no misunderstanding.

All right. Recess subject to call.

(Thereupon, the Court recessed until 1:15 o'clock p.m. of the same day.) [160]

Afternoon Session

(Thereupon, at 1:15 o'clock p.m., the further following proceedings were had, to wit:)

Mr. McCormick: If the Court please, in the case trial which concluded this morning, your Honor, in accordance with your suggestion I have procured a stipulation, which I present for filing, which provides that the material in this case may be disposed of without prejudice to the rights of either party in an appellate proceedings, and whatever else may happen in this case.

The Court: Very well. On the stipulation which has been presented, an order authorizing turning over this material to the Federal Bureau of Investigation with directions to destroy all of the material other than those portions kept as specimens for laboratory purposes.

Mr. Elias, you had requested this morning that, if at all possible, I impose sentence on the defendants today, and while this is against my usual custom in

which I like to have pre-sentence reports, I have, as you know, from your personal participation [161] in chambers this morning, been given a rather considerable dossier on each of the defendants, and, therefore, I am prepared to impose sentence at this time, if your clients are ready.

Mr. Elias: They are, your Honor.

The Court: Let them come forward.

(Thereupon, the defendant Weise and the defendant French complied.)

The Court: Mr. Weise, you have undoubtedly heard the representation of your counsel requesting that sentence be imposed at this time?

Mr. Weise: Yes, sir.

The Court: Do you likewise, Mr. French?

Mr. French: Yes, sir.

The Court: Is it your desire that we proceed with imposition of sentence at this time?

Mr. French: Yes, sir.

The Court: Very well. I would be pleased to hear anything that either of the defendants, or you, Mr. Elias, on their behalf would wish to say before sentence is imposed.

Mr. Elias: Thank you, your Honor. I feel [162] with respect to Mr. Weise that there is no question of his guilt in this particular case. I think that he feels the same way. I want the Court to understand that the manner in which this trial was conducted; namely, that Mr. Weise did not take the stand, did not attempt to perjure himself, and did not in any way attempt to fool this court or anyone with re-

spect of this Court at any time. It is, at least, an indication on his part that he certainly is aware of what he has done.

I wish further to state, if your Honor please, that this whole trial was instituted at my own direction, and I advised them to have this trial strictly on the basis of law. I am not indicating to this Court that in any way affects their guilt, but I am indicating to this Honorable Court that both of these men cooperated fully, and understood fully the significance of going to trial, and also understood fully the significance of pleading guilty.

At least it indicates, your Honor, that these people are aware of what they have [163] done, and they are also strictly aware, having been out almost a year on bond, that they cannot again get in that business.

I also wish to call your attention to the fact that Mr. Weise has a family. He is going to make a short statement to your Honor indicating the condition of his family.

Mr. French is a man of considerable age, and I wish your Honor would take that into consideration in imposing a jail term, if any, but I do think at this time, in view of the fact that we have discussed the background of these men prior to this time and advised the Court of our knowledge, that I would like to have Mr. Weise read a statement which he made up during the noon hour while in the custody of the Marshal.

The Court: He may do that.

Mr. Weise: Thank you, your Honor, for giving me this chance to make this statement.

I will be 42 years old on April the 8th, 1957. It is a coincidence that I was married on February 8, *1957*. Today happens to be my 20th Anniversary.

I have two children, a girl 16 years old, [164] and a boy 12 years old. My daughter is one of the leading students in the high school which she attends in Los Angeles, and also an officer in her sorority.

My boy has just entered junior high school. I would like with your Honor's permission to give you a little background of the circumstances in the past that have a bearing on the position I find myself in at the moment. When my son was born his right arm was injured at birth. From the time of his birth he has been constantly treated by doctors. When we arrived in Los Angeles from New York in 1947, we took him to the Children's Hospital in Los Angeles. They became interested in this case and started treating him there. He has been very close to me and very dependent upon me in all the years of his life.

In 1952 the hospital operated on his arm in order to straighten it. The operation was successful. In 1954 they operated again. This time it was a nerve transplant to get the fingers moving. It was unsuccessful. Late in 1955 they performed the same operation again with a fair amount of success. [165]

Early in 1956 the hospital suggested that we take him to the Mayo Clinic back east for additional transplants and therapy. It required a great deal of expense because it meant that he would have to stay there for at least six months to a year. It was at that time that this proposition came to me, and

in my desperation I didn't stop to think of the possible consequences and took this stupid risk.

After I was out on bail and went back to Los Angeles I was fortunate in making a connection with a secretarial service that processes and answers the mail for 217 leading movie stars. I provide them with the necessary photos of the movie stars that the fans write in for. My wife, three employees, and I do all of the work ourselves, and we are now beginning to get into a slightly better condition than we were, and we are planning to take our boy to the Mayo Clinic this summer.

In closing I would like to make a plea to your Honor to give me whatever consideration you can find because of the effect [166] your sentence might have on my daughter and her standing in the community, and my son who always needed me and needs me now due to his handicap, my family as a whole, and my business.

With deep respect, I humbly say thank you.

The Court: Mr. French, do you wish to add anything on your behalf?

Mr. French: Nothing except that I regret the mistake I made. I am a married man, have a family, have a business in Los Angeles, and that is all I can say.

The Court: Mr. McCormick, do you want to be heard?

Mr. McCormick: Nothing to add, your Honor.

The Court: The imposition of criminal sentences is far and away the most difficult and heart wrench-

ing duties of a judge. It really requires an understanding that not many human beings can possibly have.

One of the greatest tragedies of crime, as I have seen it from this position, at least, is that in almost every instance the real [167] person who suffers, the real ones who have to pay a terrible penalty, are the innocent, the children and the wives and the families. The loved ones of the defendants many times are the only ones that really pay any penalty, because often times the defendants themselves are more or less indifferent about it, but it is their loved ones who have to suffer.

I can well understand your situation, Mr. Weise, and whether you believe it or not, I grieve genuinely for your family and the family of Mr. French, and the families of all the miscreants who it becomes my sad duty to sentence on behalf of the organized community and society in which we live.

Now, it appears here that both of the defendants for years, many years, have been involved in this filthy business. There are repeated arrests in connection with it, at least one or more convictions for each of you, and Mr. Weise as recently as 1952, I think it was. He received a suspended sentence from Judge Carter, two year suspended sentence on the same sentence, and notwithstanding [168] that good break given you, you went right out and continued in this utterly reprehensible business.

Mr. French likewise has a long background of activity in this business. As near as I can see, not either one of you has ever had to pay a substantial

penalty other than perhaps money, or some financial loss, on account of having been engaged in this business, and I just couldn't live with my conscience if under these circumstances I did not impose a substantial penalty on both of you including an imprisonment penalty. It is a disagreeable duty, but it is my duty and I must do it.

Now, the question is how great a penalty should be imposed. I suppose if one could think of this business of distributing lewd and lascivious material as somewhat of a joke or a lark among men of the world, people that have been around, and I have been around, often times it is regarded lightly and jokingly, and I suppose we can't take life too seriously all of the time, but if you stop a little bit and think beyond it, [169] you realize it is a very, very, evil thing, bringing a great many evil consequences to our people.

In the first place, you are preying upon moronic, stupid people who respond only to the primitive, basic urges, and rarely, if ever, anything else. By this kind of conduct these people are incited to violence, crime, of various types, assault, rape. What little decency they have in them is dulled and lost by plying them with this kind of filth and rot.

Not only that, but in the very preparation of this kind of material I noticed in some of these pictures young girls, they couldn't have been more than 14 or 15 years old, brought into utterly degrading and revolting practices, destroying any decency they have, making little better than beasts out of them. Somebody, whether it be either one or the other or

the both of you, but somebody connected with you brought that about, and if it hadn't been for your activities and the business you were in, if you didn't make it profitable for people to do that kind of [170] a beastly thing, it probably would not be done, at least on not such a great scale.

Broad minded as I like to think I am, and ready as I am to admit my own shortcomings, and regretful I am of the many things that I have done in my own life that I am not proud of, and I say this lest you think I am standing on some lofty place looking down to a fellow being with a finger of scorn, but in spite of all those considerations, I cannot find it in my heart to feel that it would be in the public interest to do anything excepting to impose very substantial sentences.

It is obvious that both of you are in this business on a wholesale scale. It is not the simple matter of carrying a packet or two or three or a dozen or two, or something of that kind, of some kind of an objectionable article, which would be a violation of the law in itself, but here we have an enormous mass of material, 60 thousand-odd pieces of photography, and 25 lengthy reels of pornography, not to mention these books and other things. [171]

The maximum sentence provided by law for this offense is five years and a $5,000 fine. Probably under the showing here, Mr. Weise is more to be condemned. It appears that he is in this thing on a larger scale than Mr. French, although whether that be so or not, I have no real way of knowing.

On the other hand, Mr. French is a good deal older. He is sixteen years older than Mr. Weise, and hasn't got as long to go in life. I think I have got to take that into account in imposing sentence.

Also, in imposing sentence I must take into account what Mr. Elias has suggested, the fact that you did expedite the trial of the case, that neither one of you added perjury to your other offense, and I want to give you full weight to those factors in reducing the amount of the sentence that I would otherwise impose.

It appears to me that under the circumstances there should be a difference in the sentence imposed on the two of you, and I have concluded what that should be.

Upon the judgment of the Court finding [172] the defendants Moe Weise and James Lester French guilty as to Counts I and II of the Indictment herein, they are hereby adjudged guilty of the offenses stated in Counts I and II of the Indictment, and, accordingly, the defendant Moe Weise is committed to the custody of the Attorney General of the United States, or his authorized representatives, for imprisonment in such penal institution as the Attorney General may from time to time designate, for a period of four years, and that he be fined the sum of $5,000 on Count I, and a similar sentence on Count II, the two, however, to be concurrent and not consecutive, and the fines noncumulative. In other words, a total of four years imprisonment and a $5,000 fine. The same sentence, however, on each of the Counts.

It is the judgment of the Court that the defendant James Lester French be committed to the custody of the Attorney General of the United States, or his authorized representatives, for imprisonment for a period of two years, and that he be fined the sum of $2,500 on Count I, and a similar sentence [173] of two years and $2,500 on Count II; that these sentences be concurrent and not consecutive, or, in other words, a total sentence of two years imprisonment and a $2,500 fine.

That is the judgment of the Court. [174]

Certificate

I, Gerald J. Popelka, Official Court Reporter in and for the above-entitled Court, do hereby certify that the foregoing transcript of proceedings in the above-entitled matter, is a true and correct transcript.

/s/ GERALD J. POPELKA.

[Endorsed]: Filed February 26, 1957.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK
TO RECORD ON APPEAL

I, Millard P. Thomas, Clerk of the above-entitled Court, do hereby certify that pursuant to the provisions of Rule 39(b) of the Federal Rules of Crimi-

nal Procedure and Subdivision 1 of Rule 10 as amended, of the United States Court of Appeals for the Ninth Circuit, I am transmitting herewith such of the original papers, pleadings and minute entries in the above-entitled cause as are designated by the written Designation of Record on Appeal of defendants, and the said papers and pleadings, together with the original exhibits Defendants' A and B, constitute the Record on Appeal from that certain Judgment and Commitment of the above-entitled Court as to each defendant, filed and entered on the 6th day of February, 1957, to the United States Court of Appeals for the Ninth Circuit at San Francisco, California, and are identified as follows:

1. Indictment (filed May 14, 1956).

2. Defendants' Motion to Suppress the Evidence (filed January 14, 1957).

3. Judgment and Commitment of James Lester French (filed February 6, 1957).

4. Judgment and Commitment of Moe Weise (filed February 6, 1957).

5. Notice of Appeal (filed February 13, 1957).

6. Bond on Appeal of Moe Weise (filed February 6, 1957).

7. Bond on Appeal of James Lester French (filed February 6, 1957).

8. Waiver of Trial by Jury (filed February 5, 1957).

9. Defendants' Exhibit "A," Commissioner's Complaint.

10. Defendants' Exhibit "B," Commissioner's Warrant of Arrest.

11. Reporter's Transcript (filed February 26, 1957).

12. Defendants' Designation of Record on Appeal (filed March 16, 1957).

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office on behalf of the parties hereto for the preparation of the Record on Appeal in this cause, to wit:

Notice of Appeal, Defendants $5.00 and the said fee has been paid to the Clerk by the defendants.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court, at Tacoma, Washington, this 19th day of March, 1957.

[Seal] MILLARD P. THOMAS,
Clerk.

By /s/ EDGAR SCOFIELD,
Deputy.

[Endorsed]: No. 15502. United States Court of Appeals for the Ninth Circuit. Moe Weise and James Lester French, Appellants, vs. United States of America, Appellee. Transcript of Record. Appeal From the United States District Court for the Western District of Washington, Southern Division.

Filed: March 20, 1957.

Filed: April 1, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals, for the Ninth Circuit

No. 15502

MOE WEISE and JAMES LESTER FRENCH,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

STATEMENT OF POINTS UPON WHICH APPELLANTS INTEND TO RELY

To the Clerk of the Honorable Court.

Comes now Moe Weise and James Lester French, appellants in the above-entitled case, and state that on their appeal herein they will rely on the following points:

1. Failure of the Court to grant defendants' motion to suppress the evidence made under Rule 41 (e), Federal Rules of Criminal Procedure, prior to trial and during the trial and at the close of the trial.

2. That the defendants' rights under the Fourth and Fifth Amendments of the Constitution of the United States were violated by the search and seizure.

3. The complaint upon which the warrant of arrest was issued was based entirely upon hearsay evidence.

4. The complaint upon which the warrant of arrest was issued was based on an affidavit which gave only conclusions of law and no evidentiary

facts from which probable cause for issuing the warrant could have been determined as required under the Constitution of the United States and set out in Rule 41(e) Federal Rules of Criminal Procedure (4). That the search and seizure was incidental to the arrest which was illegal.

5. No one had any personal knowledge of any evidence that the car of the defendants contained any obscene material from which probable cause for issuing the arrest warrant could be determined.

6. No facts throughout the trial were elicited upon which anyone could determine whether or not there was probable cause for the issuance of the arrest warrant.

7. Any information transferred to the Government Agent who signed the affidavit resulting in the issuance of the arrest warrant was based solely on suspicion and conjecture.

8. That the only basis for the search and seizure was the warrant of arrest and as it was illegal, the arrest was illegal and the search and seizure was illegal. That therefore the motion to suppress should have been granted and the case dismissed.

9. That the law under which the indictment was brought, Title 18, USC 1465, is unconstitutional.

10. The evidence was not sufficient to support the Verdict and Judgment.

Respectfully submitted,

/s/ ROBERT M. ELIAS,
Attorney for Appellants.

[Endorsed]: Filed May 18, 1957.

Supreme Court, U.S.
FILED
APR 7 1958
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1957

No. 903

MOE WEISE and JAMES LESTER FRENCH,

Petitioners,

vs.

UNITED STATES OF AMERICA.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

EDWARD MOSK,
6305 Yucca Street,
Hollywood 28, California.
Attorney for Petitioners.

SAM ROSENWEIN,
Of Counsel.

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IN THE

Supreme Court of the United States

October Term, 1957

No. .....

MOE WEISE and JAMES LESTER FRENCH,

Petitioners,

vs.

UNITED STATES OF AMERICA.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Honorable the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on February 5, 1958.

Opinions Below.

The opinion of the Court of Appeals is not yet reported, and is appended hereto as Appendix "A". No written opinion was rendered by the District Court.[1]

[1]The oral ruling of the trial judge at the conclusion of this criminal case, tried without a jury, is contained in pages 136-145 of the Transcript of Record printed for use of the court below and included in the certified transcript of record filed with this Court. Nine additional copies of the aforesaid Transcript of Record have also been filed with this Court.

Jurisdiction.

The judgment of the Court of Appeals was entered February 5, 1958, and is appended hereto as Appendix "B". A timely petition for rehearing was denied on March 11, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Questions Presented.

1. Whether the search and seizure herein, made incidental to an alleged lawful arrest, without search warrant, violated the provisions of the Fourth Amendment and the self-incrimination and due process provisions of the Fifth Amendment.

2. Whether, consistent with the provisions of the Fourth Amendment and the due process provisions of the Fifth Amendment, probable cause existed for the arrest, search and seizure herein, made without search warrant, when predicated solely on anonymous, unverified and hearsay reports transmitted in telephone conversations between law enforcement agents, none of whom had any personal knowledge that petitioners had committed or were committing the charged offense.

3. Whether the warrant of arrest and the complaint in support thereof, upon which the arrest, search and seizure were purportedly based in part, violated the applicable provisions of Rules 3 and 4 of the Federal Rules of Criminal Procedure when the complaint failed to set forth any essential facts constituting the offense charged or any probable cause to believe that the petitioners had committed the charged offense, and was sworn to by an officer whom the record showed had no personal knowledge that petitioners had committed the alleged offense

and who acted solely on the basis of anonymous, unverified and hearsay reports not revealed in the complaint.

4. Whether the search and seizure herein made without search warrant violated the provisions of the Fourth Amendment and the self-incrimination and due process provisions of the Fifth Amendment when the record showed that there was sufficient time and that it was practical for the officers to obtain a search warrant from a United States Commissioner pursuant to the Federal Rules of Criminal Procedure before making such search and seizure.

Constitutional Provisions and Statutes Involved.

The pertinent constitutional provisions, statutes and rules involved are appended hereto as Appendix "C".

Statement of the Case.

1. The petitioners were convicted under an indictment charging them with knowingly transporting in interstate commerce from Portland, Oregon, to Tacoma, Washington, certain obscene books, pictures and films, all in violation of 18 U. S. C. 1465 [R. 3-4].[2] The case was tried, by stipulation, before the District Court without a jury [R. 7-8, 25-27]. Upon the finding of guilt [R. 143], the petitioner Weise was sentenced to imprisonment for a period of four years, and fined the sum of $5,000.00; the petitioner French was sentenced to imprisonment for a period of two years, and fined the sum of $2,500.00 [R. 157-158]. Judgments of conviction were entered accordingly [R. 8-12].

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[2]The reference "R." is to the Transcript of Record printed for the use of the court below.

During the trial, there was admitted into evidence over petitioners' objections the various books, pictures and films which served as the basis for their conviction [R. 129-130]. Prior to the trial the petitioners moved to suppress such evidence [R. 5-7], and at the inception of the trial [R. 28-33] and throughout the trial [R. 61, 74-75, 129, 134-136], objected to the admission of the testimony upon the grounds that the arrest of petitioners and the search and seizure incidental to the arrest, were all made in violation of the Fourth and Fifth Amendments and contrary to law. The aforesaid motions and objections were all denied and overruled. The validity of the aforesaid arrest, and search and seizure incidental thereto, is the sole issue here, and the facts material to the consideration of that issue is herewith presented.

2. On March 17, 1956, petitioners were traveling in an ordinary manner in a motor vehicle in the City of Tacoma in the State of Washington [R. 69], when they were suddenly forced to the curb [R. 48] by another car bearing agents of the Federal Bureau of Investigation. Petitioners were in fact surrounded by six F.B.I. Agents, occupying different cars [R. 71], all of whom were engaged in a concerted action to arrest petitioners [R. 73]. The time was after 10 o'clock in the evening [R. 66, 68].

None of the agents had search warrants or warrants of arrest. Petitioner Weise inquired, "Well, what is this all about? What is the reason for this?" [R. 49]. He was told by the agents that "they were being arrested on charges of transporting obscene matter interstate" [R. 49]. In the rear of the car, back of the front seat [R. 67], there were numerous cardboard boxes [R. 68], all tied with heavy twine, string or cord [R. 89, 126]. Upon notifying the petitioners that they were under arrest, the

agent in charge told petitioners that he was going to take the material from the car to the office of the F.B.I., that the car could be left where it was and probably be impounded, or could be stored in a garage where F.B.I. cars are usually kept [R. 84]. Petitioner Weise chose the latter alternative [R. 84]. Thereafter, the arrested petitioners and the boxes were taken by the agents to the F.B.I. office, the boxes opened up, their contents examined and listed, and subsequently used in the criminal trial of petitioners here as aforesaid [R. 118-128].

3. The attempted justification for the aforesaid arrest, search and seizure turns principally on the testimony of one witness, Frank Willard Ralston, then Senior Resident F.B.I. Agent at Tacoma [R. 63]. For this reason, we treat first the testimony of the other agents who testified at the trial, whose actions in these proceedings were only of a subordinate character and whose knowledge of the events prior to the arrest, search and seizure were of no material significance.

F.B.I. Agent Sloat [R. 33-43] followed petitioners' car in the afternoon and evening of March 17, 1956 in Portland, Oregon. He saw petitioners bring some boxes tied in string into two different shops [R. 35-37]. He then followed them across the Vancouver Bridge into Washington [R. 37], and returned to Portland [R. 39].

F.B.I. Agent Mitchelson was stationed in Vancouver, Washington, on March 17, 1956 [R. 44]. At about 8:30 in the evening, he began following petitioners' car from the aforesaid bridge to Tacoma, Washington [R. 45]. He saw the car stop for some gas [R. 45] and nothing else. Then followed radio instructions to stop the car and make the arrest [R. 48-50].

F.B.I. Agent Buchman was also stationed at Vancouver, Washington, on March 17, 1956 [R. 51]. He began following petitioners at a point near Olympia, Washington [R. 53]. The only thing he noticed thereafter was that somewhere in the vicinity of Fort Lewis, the car stopped and petitioner French took over the driving [R. 54]. The agent followed the car to Tacoma, where the "car was stopped and the occupants placed under arrest" [R. 55, 60].

F.B.I. Agent Silvey was also stationed at Tacoma, Washington, on March 17, 1956 [R. 110]. He followed the car in Tacoma and participated in the arrest [R. 111-113].

F.B.I. Agent Cummings was stationed at Tacoma, Washington, and he participated in the arrest [R. 118-119].

These were all the witnesses, except for the witness Ralston, who testified at the trial with respect to the events prior to the arrest, search and seizure herein.

4. Ralston, the Senior Resident Agent at Tacoma [R. 63], contacted the various agents at about 2:30 p.m. on March 17, 1956 to prepare to meet and follow petitioners' car [R. 64]. Nothing was done further by Ralston until 8:30 p.m. [R. 65], at which time Ralston gave further instructions to the other agents [R. 65]. At about 10 p.m. Ralston began following petitioners' car near Olympia [R. 66-67]. He saw "boxes, cardboard boxes of a brown or craft-type paper" [R. 68], in the area back of the front seat of the car [R. 67]. He followed the car into Tacoma and finally ordered the arrests to be made there [R. 71]. All the agents who participated in the arrests were acting under Ralston's orders [R. 73].

At this point in the testimony of the witness, the prosecutor stated as follows:

> "Now, the plaintiff, your Honor, would like to offer testimony at this point for the sole purpose of establishing probable cause as entirely apart from any warrant of arrest, and with the statement to the Court that I am offering it for that sole purpose" [R. 73].

Ralston then testified that he had never seen the petitioners prior to March 17, 1956 [R. 82]. All that he learned about petitioners was from a telephone conversation with two F.B.I. agents in Seattle [R. 82] about 2 p.m. on March 17, 1956 [R. 76]. He was told in this phone conversation that petitioner Weise was a "dealer in photographs of an obscene nature"; that the said petitioner "had told someone" that he was making a trip in his car loaded with the "real stuff"; that the car had been under surveillance in various cities in California and that "packages" had been taken into "different business establishments" which were "reputed to be purveyors of obscene photographs and literature"; that the said petioner had "sold obscene photographs in Seattle a few months before," but "there was no proof of interstate transportation" [R. 76-77]. Ralston stated that when he began following petitioners' car, he not only saw the boxes in the car, but he also saw that the body of the car was "down low on the rear axle" like some cars are when they have a "heavy load in it" [R. 78]. These latter two observations, the prosecution stressed, the "witness knew of his own knowledge" [R. 78].

Ralston stated that at about 10 o'clock that same evening he received information "that a complaint had been filed and a warrant had been issued for the arrest of

Moe Weise and John Doe" [R. 78].[3] Based on the aforesaid, Ralston ordered the arrest of petitioners [R. 78]. Ralston stated that if he hadn't learned about the warrant of arrest, he didn't know whether or not he would have made the arrest [R. 79]. Ralston thought he would have waited longer "to ascertain if he made any deliveries of material either in Tacoma or other places in Washington" [R. 80]. The reason for Ralston's reluctance appears plain. The charge here was interstate transportation between Oregon and Washington [R. 3-4]. Only one agent had seen petitioners deliver some boxes to two shops in Oregon, and this officer did not even purport to testify that the shops were "reputedly" purchasers of "obscene" material [R. 35-37]. There were no visits to any shops in Washington.

5. The trial judge upheld the arrest, search and seizure [R. 139-143]. The court held first, that Ralston was entitled to rely solely on the hearsay testimony he had received, holding that this question was foreclosed by this Court's decision in *Costello v. United States*, 350 U. S. 359 [R. 142]. The court held, secondly, that such hearsay testimony gave Ralston "probable cause for believing that defendants were guilty of this offense with which they are charged here" [R. 142].

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[3]The prosecution did not offer or introduce the warrant of arrest or complaint into evidence, nor did it call to the stand Agent Heiner who swore to the complaint. After the prosecution rested, the petitioners renewed their motion to suppress [R. 134] and offered the arrest warrant and complaint into evidence to demonstrate their invalidity [Deft. Exs. A, B, R. 135; R. 19-22]. Neither the trial judge [R. 141], nor the court below (App. A), placed reliance on the warrant to justify the arrest, search and seizure. The prosecutor also agreed that the language of the complaint "might have been expanded" [R. 136]. It was for this reason, apparently, that the sole evidence offered at the trial was to establish "probable cause as entirely apart from any warrant of arrest" [R. 73].

6. The Court of Appeals affirmed (App. A). The court held that while the seizures had been made without a search warrant, still they could be justified as incidental to a lawful arrest. The court held that Ralston "himself" did not have to have probable cause to believe that an offense was being committed; and that on the issue of probable cause the case was governed by the decision of this Court in *Brinegar v. United States,* 338 U. S. 160.[4]

Reasons for Granting the Writ.

Prefatory Statement.

The courts below have decided an important question of federal law which has not been, but should be, settled by this court. Whether the considerations which led this court to decide that the return of a grand jury indictment may be based solely on hearsay evidence (*Costello v. United States,* 350 U. S. 359) apply equally to an arrest, search and seizure under the Fourth and Fifth Amendments is an important question affecting the privacy of citizens which this court should decide. Clearly this Court has never decided that an arrest, and a search

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[4]Some of the "facts" relied upon in the court below do not appear in the printed Transcript of Record. Ralston did not testify at the trial that petitioner Weise "was known to the agents of the Federal Bureau of Investigation as a dealer in pornographic material and of having a record of convictions as such" (App. A, p. 1), nor did Ralston testify that petitioner Weise had "told an agency informer that he had pornographic material for sale" (App. A, p. 1). The complaint in support of the warrant of arrest [Deft. Ex. A, R. 19-20] contained no such facts, nor indeed any evidentiary facts. If there were any facts which were not communicated to the arresting officer, or which were not revealed to the trial judge so far as shown by the printed Transcript of Record, and which therefore could not be met by petitioners in the District Court or Court of Appeals, the validity of the arrest, search and seizure could not thus be upheld under the Fourth Amendment or the due process provisions of the Fifth Amendment.

and seizure incidental to such arrest, may be based solely on hearsay testimony stemming from the unverified report of an unknown informant and the so-called reputation of the accused.

The court below has decided an important federal question in a way in conflict with applicable decisions of this Court. Nothing in the decisions of this Court, particularly in *Brinegar v. United States*, 338 U. S. 160, or its predecessor, *Carroll v. United States*, 267 U. S. 132, suggests a purpose to lower the evidentiary standards governing the conduct of law enforcement agencies in making arrests, searches and seizures in the light of the inhibitions of the Fourth and Fifth Amendments to the Constitution. This Court's decisions have constantly admonished that if the privacy of one's person and property are to be protected officials must act only upon facts and circumstances within their knowledge and upon which they have trustworthy information sufficient in themselves to justify a cautious and reasonable man in the belief that the offense charged has been or is being committed. Citizens cannot be safeguarded from unreasonable interferences with their privacy or from unfounded charges of crime if officials act only upon suspicion, conjecture or surmisal. If suspicion can be equated with probable cause, and dispassionate investigation of alleged offenses eliminated, the "knock on the door" may become an agonizing reality. In holding that the decision in *Brinegar* governed the case herein, the court below opened the door for inroads into the Constitution which this Court should prevent. (*Boyd v. United States*, 116 U. S. 616, 635.)

The Court of Appeals below has rendered a decision in conflict with the decision of other courts of

appeal on the same matter. The weight of authority supports the view that hearsay evidence alone, of the character and quality offered in the case herein, is insufficient to support a conclusion of "probable cause" upon which arrest, search and seizure may be predicated. The record does not show that the officer had any cause, probable or otherwise, to believe that petitioners were committing or had committed the crime charged in the indictment herein. Most courts have rightfully refused to hold that an "anonymous tip" or general "reputation" is enough to warrant the seizure of persons, their papers or effects. The court below, by its ruling, undermined the very basis of due process of law and the essential principles of the Fourth Amendment.

The court below has so far departed from the accepted and usual course of judicial proceedings, and so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision. The complaint upon which the warrant of arrest was based, made by an officer who had no personal knowledge of the statutory conclusions to which he swore, and which even failed to set forth the essential ingredients of the offense, was in palpable violation of the applicable provisions of the Federal Rules of Criminal Procedure. Since the warrant of arrest which the officer purportedly relied on in part proved to be invalid, the prosecution at the trial sought to support the arrest, and the incidental search and seizure, by some vague hearsay statements, thrice removed, which were plainly insufficient to support a finding of probable cause. When this proved inadequate, the prosecutor urged that the officer had personally observed "brown cardboard boxes" in the "loaded" car.

While freedom from unlawful arrest, search and seizure is available alike to the guilty as well as to the innocent, it is not unimportant on the question of probable cause to examine the nature of the offense allegedly committed. Ralston was not testifying about his suspicions concerning "brown boxes" under a charge of interstate transportation of intoxicating liquors, narcotics, firearms or lottery tickets. Without any reasonable grounds for his belief, he made an arrest for unlawful interstate transportation of "obscene" materials. But "sex and obscenity are not synonymous," and material is "obscene" only when it deals "with sex in a manner appealing to prurient interest." (*Roth v. United States*, 354 U. S. 476, 487.) It is, therefore, "vital that the standards for judging obscenity safeguard the protection of freedom of speech and press for material which does not treat sex in a manner appealing to prurient interest." (*Id.*, at p. 488.) On the record here, the officer who made the arrest, search and seizure acted neither as a reasonable man nor as a cautious man. The condonation of such conduct by the courts below was inconsistent with the principles of an ordered society and the true administration of criminal justice in the federal courts.

1. The case has been treated below primarily as if it were one involving a search and seizure incidental to a lawful arrest made without warrant. We treat this issue first. We then discuss the invalidity of the warrant of arrest, and the impropriety of justifying the search and seizure herein as if it were incidental to an arrest under a lawful warrant. Finally, we touch upon the invalidity of the search and seizure if it is attempted now to justify the same without recourse to a prior valid arrest.

The history and function of the Fourth Amendment, and the related provisions of the Fifth Amendment, have received profound analysis by this Court and need no further elucidation here. (See *Boyd v. United States*, 116 U. S. 616, 624-635; the dissenting opinions of Mr. Justice Frankfurter in *Harris v. United States*, 331 U. S. 145, 157-163, and *United States v. Rabinowitz*, 339 U. S. 56, 69-86.) "But the forefathers, after consulting the lessons of history, designed our Constitution to place obstacles in the way of a too permeating police surveillance, which they seemed to think was a greater danger to a free people than the escape of some criminals from punishment." (*United States v. Di Re*, 332 U. S. 581, 595.)

The search and seizure here was without a search warrant. It follows, in the light of the constitutional requirements, that the burden of proof was on the prosecution to establish the validity of the arrest, and the search and seizure incidental thereto. (*United States v. Jeffers*, 342 U. S. 48, 51; *McDonald v. United States*, 335 U. S. 451, 454.) Conversely, and for similar reasons, neither the arrest, search nor seizure can be justified by what was ultimately turned up. (*Johnson v. United States*, 333 U. S. 10, 16; *United States v. Di Re*, 332 U. S. 581, 595.)[5] Moreover, the findings by lower courts of "probable cause" cannot prevent this Court's review on whether the findings comport with the constitutional

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[5]The court below noted that the boxes seized "were found to contain some 60,000 photographs and various other pornographic material" (App. A, p. 2). While this finding is irrelevant to the issue here, it should be noted that the trial judge was actually of the view that some of the evidence seized was "hardly of a character to be deemed obscene by the standards of this day and age" [R. 137], and on appeal the Government conceded that some 80% of the photographs were not necessarily within the statutory proscription (Br. of Appellee in Court of Appeals, p. 5).

requirements. "The question is not whether he [the officer] thought the facts to constitute probable cause, but whether the courts think they did. Holmes on the Common Law, 140. Probable cause is a mixed question of law and fact." (*Director General v. Kastenbaum*, 263 U. S. 22, 28.)

The issue is whether Agent Ralston had reasonable cause for believing that petitioners on March 17, 1956 had committed, or were committing, the offense proscribed by 18 U. S. C. 1465.[6] The essential ingredients of that offense are (1) knowledge, (2) transportation in interstate or foreign commerce, (3) intent to sell or distribute, and (4) "obscene" books, pamphlets, pictures, etc.

Ralston had no personal knowledge that the petitioners had committed any one of these elements of the crime. He had never seen petitioners before that day. All he saw through his own sensory organs was a motor vehicle travelling in an ordinary manner in the City of Tacoma loaded in the rear with brown cardboard boxes tied with twine and string. It needs little argument to establish that such facts did not warrant any arrest, or search and seizure. (See, *Wrightson v. United States*, 222 F. 2d 556 (C. A. D. C., 1955); *United States v. Sipes*, 132 Fed. Supp. 537 (D. C. Tenn., 1955).)

The officer is therefore compelled to rely on the telephone message he received from his co-agent. But plainly a telephone message cannot *per se* validate an unlawful arrest, search and seizure. The summary assertions made in a brief phone call by a co-agent could not confer upon

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[6]The statute had only been enacted about a year before. 69 Stat. 183.

the arresting officer any greater authority than the co-agent himself would have if he were making the arrest. The short of the matter is that these initial hearsay conclusions upon which the officer relied in the phone conversation must themselves be tested for their adequacy, before the arrest, search and seizure here can be upheld. (*Nathanson v. United States*, 290 U. S. 41.)

The question then comes down to what the two agents who spoke to Ralston on the telephone [R. 75] personally knew relative to the alleged commission of the charged offense by these petitioners. *These two agents were not called as witnesses by the prosecution.* They were not shown to be unavailable, and it must be assured that their testimony would not have been helpful to the prosecution in establishing probable cause for the arrest, search and seizure here. (*United States v. Di Re*, 332 U. S. 581, 593.)

All that Ralston knew, therefore, was the hearsay untested conclusions of his co-agents who themselves were without any personal knowledge, so far as this record reveals. The business establishments in California to which the petitioners delivered "packages" [R. 76] bore a "reputation," according to the co-agents, of being purveyors of "obscene photographs and literature" [R. 76] and petitioner Weise had "told someone" in Los Angeles that he was making a trip with the "real stuff" [R. 76]. There was no evidence to show who that "someone" was or his reliability or indeed, his existence, if any. No evidence was introduced to show how the co-agents concluded that petitioner Weise was a "dealer in photographs of an obscene nature"; no evidence was produced to show how the "reputation" of the different business establishments was known. Nor is it insignificant that despite

the alleged surveillance of petitioners from March 15 to March 17 [R. 76], the co-agents were unable to report a single instance in which an investigation had been made of a single establishment to determine whether a "package" had been delivered by petitioners, or whether the package contained "obscene" materials [R. 76].

No argument can now be made, if such argument be valid, that the co-agents could not be expected in a brief telephone conversation to give Ralston all the facts. At the time of the trial herein, there was every opportunity to present any evidence, if they had any. The co-agents did not appear.

There is no decision of this Court or of any of the lower courts which supports an arrest, search and seizure upon the basis of the evidence appearing in this record. It has been uniformly held that private rights cannot be lost under the Constitution on the basis of information derived from an anonymous, undisclosed and unverified source, especially when such information is as vague and weak as it was in the case herein. (*Johnson v. United States*, 333 U. S. 10, 16; *Contee v. United States*, 215 F. 2d 324, 327 (C. A. D. C., 1954); *Brown v. United States*, 4 F. 2d 246, 247 (C. A. 9, 1925); *United States v. Kind*, 87 F. 2d 315, 316 (C. A. 2, 1937); *United States v. Lee*, 83 F. 2d 195, 196 (C. A. 2, 1936); *Salata v. United States*, 286 Fed. 125, 126 (C. A. 6, 1923).[7] See also, *Roviaro v. United States*, 353 U. S. 53.)

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[7]The District Courts have also suppressed evidence based on such testimony. See, *United States v. Castle*, 138 Fed. Supp. 436, 439 (D. C. D. C., 1955); *United States v. Clark*, 29 Fed. Supp. 138, 140 (D. C. Mo., 1939); *United States v. Keown*, 19 Fed. Supp. 639, 645 (D. C. Ky., 1937); *Reeve v. Howes*, 33 Fed. Supp. 619, 622 (D. C. Pa., 1940).

Nor does it aid the prosecution's case for the arresting officer to have heard from his co-agents over the telephone that the accused once "sold" obscene photographs, or that the business establishments which were visited by petitioners, seemingly in an ordinary and law-abiding manner, were "reputedly" purveyors of obscene literature. Without any evidence in the record to support these conclusions, without any showing of how these conclusions were reached, such hearsay testimony was only the equivalent of gossip, rumor and suspicion upon which no conclusion of probable cause could be based. (See *Johnson v. United States*, 333 U. S. 10; *McDonald v. United States*, 335 U. S. 451; *Wrightson v. United States*, 222 F. 2d 556 (C. A. D. C., 1955); *Pearson v. United States*, 150 F. 2d 219 (C. A. 10, 1945); *United States v. Turner*, 126 Fed. Supp. 349 (D. C. Md., 1954).)

It is submitted, therefore, that the arrest, search and seizure here was made without probable cause in violation of the constitutional provisions, and that it was error to admit the material seized into evidence over petitioner's objections. The ruling of the District Court that the case here was comparable to the case decided by this Court in *Costello v. United States*, 350 U. S. 359, appears baseless. The historic antecedents of the grand jury system are quite distinct from those of the Fourth and Fifth Amendments. Moreover, even if an indictment is returned based wholly on hearsay, the accused is always entitled to a jury trial thereafter where his guilt must be established beyond a reasonable doubt by competent evidence. On the other hand, once an arrest, search and seizure are upheld on a finding of probable cause, the rights of the accused are lost forever. By ancient usage the deliberations of a grand jury are secret

and inviolate; while the issue of probable cause is a judicial question to be decided in the open upon a careful scrutiny of the facts supporting the conclusion. Thus, the hearsay evidence which may support an indictment will be far from supporting a finding of probable cause.

The decisions relied on by the court below do not support its judgment. Each of the cases was based on the personal knowledge of the arresting officers. In *Marron v. United States*, 275 U. S. 192, whatever may be its present vitality, the speakeasy was a "common nuisance" and the crime actually was being committed in the officers' presence. In *Brinegar v. United States*, 338 U. S. 160, this Court stressed that the arresting officer had acted on facts derived from his personal observation "without the hearsay concerning general reputation" (p. 172). The officer, who had personally arrested the accused a few months before for illegally transporting liquor, had personally seen him load liquor into a truck, and himself knew that the accused hauled liquor from a "wet" state to a "dry" state (p. 162). There were also admissions of guilt before the arrest (p. 163). In *United States v. Li Fat Tong*, 152 F. 2d 650, in addition to the information received, the accused dropped a bottle of opium in the presence of the officers before his arrest (p. 651). In *Roviaro v. United States*, 353 U. S. 53, this Court described the *Li Fat Tong* decision as one where there "was sufficient evidence" apart from the confidential communications of an informant (p. 61 and fn. 11). In *United States v. Bianco*, 189 F. 2d 716 (C. A. 3, 1951), the investigating officers who testified at the trial, did not rely on "hearsay alone," but on their own personal observations which were revealed to the trial judge (pp. 719-720).

2. As noted heretofore, Ralston stated at the trial that he relied in part upon the phone information received from agent Heiner that the latter had obtained a warrant of arrest. The warrant of arrest, and the complaint upon which it was based, however, was not put into evidence by the prosecution and agent Heiner was not called as a witness. The courts below placed no particular reliance on the warrant. The complaint and warrant were palpably invalid.

This Court in *Mallory v. United States*, 354 U. S. 449, 453, described the Federal Rules of Criminal Procedure as "the procedure devised by Congress for safeguarding individual rights without hampering effective and intelligent law enforcement". Referring to Rule 4 of the said rules, this Court stated (p. 454): "The scheme for initiating a federal prosecution is plainly defined. The police may not arrest upon mere suspicion but only on "probable cause".

Rule 3 of the Federal Rules of Criminal Procedure defines the complaint as a written statement of "the essential facts constituting the offense charged". Rule 4(a) provides that a warrant shall issue only "if it appears from the complaint that there is probable cause to believe that an offense has been committed and that the defendant has committed it".

An examination of the complaint herein [Deft. Ex. A; R. 19-20] reveals that the Rules of Criminal Procedure were completely ignored. There is not a single "essential fact" set forth therein upon which a finding of "probable cause" could be made. Not even the meagre facts which Heiner purportedly told to Ralston over the phone, as testified to in the trial, are set forth in the complaint. All that appears is the attempt to use the statutory language as a substitute for evidence. There is no fact to support the

conclusion of "knowledge", no fact to show "interstate transportation"; no fact to show a "purpose of sale and distribution"; and no fact to show "obscenity".

Moreover, it is clear from Ralston's testimony at the trial, and from other portions of the record [R. 6], that although the complaint was made upon the positive oath of agent Heiner, it is in reality a complaint based upon information and belief, and nothing more. A complaint made on information and belief, which does not give the grounds of the belief nor the sources of information, does not confer jurisdiction upon a United States Commissioner to issue a warrant of arrest, and an arrest, search and seizure made pursuant thereto cannot be sustained. (*Go-Bart Importing Co. v. United States*, 282 U. S. 344, 355; *Byars v. United States*, 273 U. S. 28; *United States ex rel. King v. Gokey*, 32 F. 2d 793 (D. C. N. Y., 1929).)

3. Without reliance upon an alleged lawful arrest, the search and wholesale seizure here (see *Kremen v. United States*, 353 U. S. 346) can find no support. As we have shown above, the officers who made the search and seizure had no probable cause for believing that the petitioners had committed, or were committing the offense charged. It follows that the search and seizure, in the absence of a search warrant, was invalid. (*Carroll v. United States*, 267 U. S. 132, 154; *United States v. Di Re*, 332 U. S. 581, 585; *Casey v. United States*, 343 U. S. 808; *Clay v. United States*, 239 F. 2d 196 (C. A. 5, 1956); *Carr v. United States*, 59 F. 2d 991 (C. A. 2, 1932).)

Moreover, the search and seizure were in any event invalid because the record demonstrates that there was time and that it was practical for the officers to obtain a search warrant. This was not a "fleeing vehicle" nor was

there any "hot pursuit". For two days the petitioners were followed, all their stops observed, and it was plain that they would ultimately return to Los Angeles. Even after their arrest, the car could have been guarded or stored while a search warrant was obtained. Clearly there was as much time to obtain a search warrant as there was to obtain the invalid warrant of arrest herein. Under the circumstances, petitioners' vehicle was as much entitled to protection as their home or business office. (*McDonald v. United States,* 335 U. S. 451; *Clay v. United States,* 239 F. 2d 196, 204 (C. A. 5, 1956); *Rent v. United States,* 209 F. 2d 893 (C. A. 5, 1954); *Hobson v. United States,* 226 F. 2d 890 (C. A. 8, 1955).)

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

EDWARD MOSK,

Attorney for Petitioners.

SAM ROSENWEIN,

Of Counsel.

APPENDIX "A."

Opinion Below.

United States Court of Appeals for the Ninth Circuit.

Moe Weise and James Lester French, Appellants, vs. United States of America, Appellee. No. 15,502. Feb. 5, 1958.

Appeal from the United States District Court for the Western District of Washington, Southern Division.

BEFORE: HEALY, POPE, and LEMMON, Circuit Judges

HEALY, Circuit Judge

Appellants were convicted of the offense of transporting obscene material interstate (from Portland, Oregon, to Tacoma, Washington) in violation of 18 USCA §1465. On the appeal they contend only that the trial court erred in admitting the obscene material in that it had been illegally seized in violation of the Fourth Amendment to the Constitution.

Following is in summary the train of events leading up to the arrest and seizure. Appellant Weise was known to the agents of the Federal Bureau of Investigation as a dealer in pornographic material and of having a record of convictions as such. On March 15, 1956, he was under agency surveillance at Los Angeles. On that date he and appellant French left Los Angeles in the former's car, which was observed to be heavily loaded. FBI agents followed them to San Francisco where Weise told an agency informer that he had pornographic material for sale. While in San Francisco appellants were observed making calls at novelty shops which were known to deal in obscene material. At each call packages were removed from the car and delivered to the shop or store. Agents

in Oakland and Sacramento observed similar activities of appellants in those cities.

Appellants then drove to Portland, where they were again placed under surveillance by the FBI and were observed as before taking packages into stores known to deal in obscenity. On the night of March 17 appellants left Portland and traveled to Tacoma, being constantly under surveillance. Meanwhile Agent Heiner in Seattle, who had been kept advised of the activities through normal agency channels, filed a complaint charging violation of the relevant statute, the charge being lodged with United States Commissioner Burns in Seattle, who issued a warrant of arrest thereon. Simultaneously Agent Ralston in Tacoma was briefed on the above facts in a 45-minute phone conversation with the Seattle agent. Ralston undertook surveillance of appellants' car as it passed through Olympia and followed it to Tacoma. He personally observed that the car in question was heavily loaded and contained cardboard boxes piled on the back seat. In Tacoma appellants were stopped and placed under arrest. The boxes were seized incident to the arrest and were found to contain some 60,000 photographs and various other pornographic material.

The seizures were made without a search warrant. However, as indicated above, they were incident to the arrest of appellants, and if the arrests were lawful, the seizures were lawful. Marrion v. United States, 275 U. S. 192; Sugarman v. United States (9 Cir.), 35 F. 2d 663, at 665. But appellants argue that the arrests were illegal because, they say, there was no sufficient ground either for the issuance of the warrant of arrest or for an arrest without a warrant. They insist that the activities and knowledge of the FBI were insufficient to create

probable cause to believe that an offense was being committed. The contention is predicated on the proposition that the arrest is illegal unless the arresting officer himself has probable knowledge that an offense is being committed.

The cases cited for this proposition are United States v. Tureaud (1884), Circuit for the District of Louisiana, 20 Fed. 621; and Grau v. United States, 287 U. S. 124. The Tureaud case, in addition to being old, involved, not a warrant for arrest, but a sworn information—a proceeding no longer in use. In light of the later cases it is wholly without validity. The Grau case is not in point. It involved a search warrant which was held not to state certain vital facts required by the National Prohibition statute, providing that "no search warrant shall issue to search any private dwelling occupied as such unless it is being used for the unlawful sale of intoxicating liquor." The affidavit for the warrant in question showed only a possible manufacture of spirits. By way of dicta the Court observed, at p. 128, "A search warrant may issue only upon evidence which would be competent in the trial of the offense before a jury [citations]; and would lead a man of prudence and caution to believe that the offense has been committed."

In Brinegar v. United States, 338 U. S. 160, a rum-running case not markedly different from the present on its facts, the Supreme Court observed at p. 175 of its opinion that "In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. The standard of proof is accordingly correlative to what must be proved."

And, at p. 174, note 13, the Court referred to the dictum in Grau v. United States, *supra*, which we have quoted above, and went on to say that "for this proposition there was no authority in the decisions of this Court."

See further the holding of the Third Circuit in the Analogous case of United States v. Bianco, 189 F. 2d 716. Consult, also, United States v. Li Fat Tong, 2 Cir., 152 F. 2d 650, 652.

Affirmed.

(Endorsed:) Opinion. Filed Feb. 5, 1958.

Paul P. O'Brien, Clerk.

APPENDIX "B."

Judgment.

United States Court of Appeals for the Ninth Circuit.

Moe Weise and James Lester French, Appellants, vs. United States of America, Appellee. No. 15,502.

Appeal from the United States District Court for the Western District of Washington, Southern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Western District of Washington, Southern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is affirmed.

(ENDORSED) Judgment

Filed and entered: February 5, 1958

PAUL P. O'BRIEN, Clerk.

APPENDIX "C."

Constitutional Provisions and Statutes Involved.

CONSTITUTION OF THE UNITED STATES
FOURTH AMENDMENT

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

FIFTH AMENDMENT

"No person shall be . . . compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; . . ."

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18 U. S. C. 1465

"Whoever knowingly transports in interstate or foreign commerce for the purpose of sale or distribution any obscene, lewd, lascivious, or filthy book, pamphlet, picture, film, paper, letter, writing, print, silhouette, drawing, figure, image, cast, phonograph recording, electrical transcription or other article capable of producing sound or any other matter of indecent or immoral character, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

"The transportation as aforesaid of two or more copies of any publication or two or more of any article of the character described above, or a combined total of five

such publications and articles, shall create a presumption that such publications or articles are intended for sale or distribution, but such presumption shall be rebuttable.

"When any person is convicted of a violation of this Act, the court in its judgment of conviction may, in addition to the penalty prescribed, order the confiscation and disposal of such items described herein which were found in the possession or under the immediate control of such person at the time of his arrest. Added June 28, 1955, c. 190, §3, 69 Stat. 183."

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18 U. S. C. 3052

"The Director, Associate Director, Assistant to the Director, Assistant Directors, inspectors, and agents of the Federal Bureau of Investigation of the Department of Justice may carry firearms, serve warrants and subpoenas issued under the authority of the United States and make arrests without warrant for any offense against the United States committed in their presence, or for any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony. As amended Jan. 10, 1951, c. 1221, §1, 64 Stat. 1239.

RULE 3, FEDERAL RULES OF CRIMINAL PROCEDURE

"The complaint is a written statement of the essential facts constituting the offense charged. It shall be made upon oath before a commissioner or other officer empowered to commit persons charged with offenses against the United States."

RULE 4(a), FEDERAL RULES OF CRIMINAL PROCEDURE

"If it appears from the complaint that there is probable cause to believe that an offense has been committed and that the defendant has committed it, a warrant for the arrest of the defendant shall issue to any officer authorized by law to execute it. Upon the request of the attorney for the government a summons instead of a warrant shall issue. More than one warrant or summons may issue on the same complaint. If a defendant fails to appear in response to the summons, a warrant shall issue."

LIBRARY
SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

October Term, 1957.

No. 903.

MOE WEISE and JAMES LESTER FRENCH,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITIONERS' REPLY BRIEF.

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IN THE

Supreme Court of the United States

October Term, 1957.
No. 903.

MOE WEISE and JAMES LESTER FRENCH,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITIONERS' REPLY BRIEF.

1. The "question presented" by the United States, as respondent in opposition to the petition for a writ of certiorari (Br. p. 2), is neither legally nor factually appropriate. The basic question is not the lawfulness of the arrest, but the validity of the search and seizure purportedly made incidental to the alleged lawful arrest. The search and seizure here was concededly made without a search warrant, unmentioned by respondents' "question presented". Respondent has therefore failed to controvert the real issues presented in the petition for a writ of certiorari herein (Pet. pp. 2-3). It virtually concedes that question "3" in the petition must be answered in the affirmative (Br. p. 5, fn. 3; p. 6, fn. 4) and it has made no attempt to answer question "4".

The respondent, in its "question presented", asserts that probable cause for the arrest was predicated upon "information received through a telephonic F.B.I. report" and "corroborated through the personal surveillance of F.B.I. agents" (Br. p. 2). Respondent however omits the fact that the so-called telephonic report was based "solely on anonymous, unverified and hearsay" information (Pet. p. 2), and that the agent who made the telephone call to the arresting officer had no more reliable knowledge of the commission of any offense than did the arresting officer, nor did such agent testify at the trial on the issue of probable cause. Respondent piles unreliable hearsay upon unreliable hearsay to justify "probable cause", asserting that the phone conversation was corroborated by "personal surveillance". Respondent omits to state that the surveillance amounted to no more than observing an automobile carrying boxes tied with twine, string or cord, and seeing "packages" being taken into "different business establishments" which were "reputed to be" purveyors of obscene material (Pet. pp. 3-8).

The record here is irrefutable that neither the arresting officer nor any officer who spoke to him on the phone or followed the petitioners' car had the slightest probable cause to believe that petitioners had committed or were committing a violation of 18 U. S. C. 1465 (Pet. pp. 3-9). Questions "1" and "2" in the petition (p. 2) raise, therefore, along with "3" and "4", serious and substantial constitutional issues which this Court, it is respectfully submitted, should decide.

2. Respondent avoids meeting the issues involved in this case by ascribing to petitioners arguments nowhere advanced in the petition for a writ of certiorari. Thus, it is stated that in effect petitioners urge that to establish

probable cause, the evidence must be such as "would be required to convict at trial" (Br. p. 6), and that the arresting officer could act only upon what he saw, and "not on the facts communicated to him" (Br. p. 7). Respondent appears to have misread the petition (Pet. pp. 14-17).

The question involved here is whether "the facts communicated" to Ralston, the arresting officer, who himself had no personal knowledge, were sufficient to bolster this lack of knowledge and to justify the finding of probable cause upon which the arrest, search and seizure were made. What respondent has not touched upon is this: the officers who spoke to Ralston on the telephone were not called as witnesses by the prosecution; the "facts" which they communicated to Ralston were not personally known to them, and all the so-called "facts" were in the nature of unverified hearsay, rumor and conjecture (Pet. pp. 15-17).*

Respondent concedes that the telephone call to Ralston was predicated on hearsay, solely, but declares that the hearsay cannot be termed "unreliable". (Br. p. 8.) The respondent denies that the hearsay was based "on surmise, or rumor, or evidence of general reputation" (Br. p. 8), but these conclusions are refuted by respondent's own statement of the case (Br. pp. 4-5; see Pet. pp. 3-9).

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*Respondent now states that petitioners "had in fact records of arrest and conviction for activities involving obscene materials [R. 154]" (Br. p. 4, fn. 1). The record reference is to a statement made at time of sentence. The arresting officer did not testify that he had any such knowledge, nor that such knowledge was communicated to him. If probable cause cannot be predicated upon what is eventually found, clearly it cannot be predicated upon what is eventually known after the arrest, search and seizure. See *Johnson v. United States*, 333 U. S. 10, 16.

The fact is that respondent is unable to maintain its position that Ralston acted upon "reliable" information. If Ralston was told that a petitioner once "sold obscene photographs" in the State of Washington (Br. p. 7), respondent is unable to show from the record any evidence to support this assertion; nor does respondent assert that any arrest or conviction followed such alleged sale; nor does respondent show how such an alleged sale supports a finding of probable cause that petitioners had violated 18 U. S. C. 1465.

If "packages" were seen unloaded at establishments "reported to deal in pornography" (Br. p. 7), respondent is unable to show how this unverified assertion can be termed "reliable". Moreover, respondent concedes that the single alleged statement attributed to one of the petitioners came from an "anonymous" informer (Br. p. 8, fn. 5), and respondent's only answer is that before the trial court, petitioners did not request "the identity of the informer" (Br. p. 8, fn. 5). But respondent's testimony did not become more "reliable" because a request for identity was not made: the prosecution never produced the agent who allegedly relayed the anonymous information to Ralston on the phone: and, in any event, the burden of proof to show probable cause for a search and seizure without warrant was upon the prosecution (Pet. p. 13).

Respondent argues that the arrest, search and seizure herein were warranted by this Court's decision in *Brinegar v. United States*, 338 U. S. 160. Petitioners, on the other hand, assert that *Brinegar* was decided on quite different facts; that rightly considered, *Brinegar* condemns the action of the officers here; and that far from being a "stronger" case (Br. p. 6), this case presents

an attempt to extend *Brinegar* to a situation palpably violative of the constitutional guarantees (Pet. pp. 10, 18).

3. Respondent makes no attempt to uphold the validity of the warrant of arrest (Br. p. 5, fn. 3; Br. p. 6, fn. 4). It asserts that the invalid warrant (Pet. pp. 19-20) was merely one of the factors "bearing upon the issue of probable cause to arrest without a warrant" (Br. p. 6, fn. 4).

Such an assertion, however, itself raises a question which this Court should determine. Can a search and seizure made incidental to an alleged lawful arrest without warrant be justified in part on the basis of an admittedly illegal warrant of arrest?

Moreover, respondent overlooks that officer Ralston testified that if he hadn't learned about the invalid warrant of arrest, he didn't know whether or not he would have made the arrest (Pet. p. 8). It would appear, therefore, from the record that the principal reliance of the arresting officer for the arrest, search and seizure was upon a warrant of arrest which was concededly illegal. If the arrest was so tainted, it is submitted that such taint applied equally to the search and seizure which followed.

4. Respondent does not deny that there was time and that it was practical to obtain a search warrant before the search and seizure was made herein (Pet. pp. 20-21). It has ignored this issue, presumably on the basis that the case herein involves a "moving vehicle on a public highway" (Br. p. 6). Nothing in *Brinegar* or *Carroll* supports the view that occupants of a vehicle are without the protection of the provisions of the Fourth and Fifth Amendments. This Court, it is respectfully submitted, should dispel such unwarranted illusion.

Conclusion.

The respondent's brief emphasizes the importance of the questions presented herein. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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OCTOBER TERM, 1957

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v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 166; Pet. App. A) is reported at 251 F. 2d 867.

JURISDICTION

The judgment of the Court of Appeals was entered on February 5, 1958 (R. 169; Pet. App. B). A petition for a rehearing was denied on March 10, 1958 (R. 170). The petition for a writ of certiorari was filed on April 7, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether information received through a telephonic F.B.I. report, and corroborated through the personal surveillance of F.B.I. agents, constituted probable cause for the agents to arrest petitioners in a moving vehicle on a public highway.

STATUTES INVOLVED

18 U.S.C. 3052 provides:

Powers of Federal Bureau of Investigation.

The Director, Associate Director, Assistant to the Director, Assistant Directors, inspectors, and agents of the Federal Bureau of Investigation of the Department of Justice may carry firearms, serve warrants and subpœnas issued under the authority of the United States and make arrests without warrant for any offense against the United States committed in their presence, or for any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony.

18 U.S.C. (Supp. V) 1465 provides in relevant part:

Transportation of obscene matters for sale or distribution.

Whoever knowingly transports in interstate or foreign commerce for the purpose of sale or distribution any obscene, lewd, lascivious, or filthy book, pamphlet, picture, film, paper, letter, writing, print, silhouette, drawing, figure, image, cast, phonograph recording, electrical transcription or other article capable of producing sound or any other matter of indecent or immoral character,

shall be fined not more than $5,000 or imprisoned not more than five years, or both.

The transportation as aforesaid of two or more copies of any publication or two or more of any article of the character described above, or a combined total of five such publications and articles, shall create a presumption that such publications or articles are intended for sale or distribution, but such presumption shall be rebuttable.

* * * * * * * * *

STATEMENT

Following a trial before the court in the United States District Court for the Western District of Washington, petitioners were convicted on two counts of an indictment alleging the transportation of obscene material in interstate commerce from Portland, Oregon, to Tacoma, Washington, in violation of 18 U.S.C. 1465 (R. 3-4, 145). Petitioner Weise was sentenced to a term of imprisonment of four years on each count and to pay a fine of $5000, the terms to run concurrently (R. 157), and petitioner French to imprisonment for two years on each count, to run concurrently, and a fine of $2500 (R. 158). On appeal the judgment was affirmed (Pet. App. B).

Petitioners were arrested as they drove in an automobile through Tacoma, Washington, by agents of the Federal Bureau of Investigation not in possession of a warrant (R. 43-57, 72-73, 80, 82). In the car the agents found and seized boxes containing some 60,000 picture prints, several copies of books, and numerous reels of film and rubber images, the great mass of which was pornographic (R. 87-133, 137-138). Petitioners moved, before and during trial, to suppress the evidence, alleging that a warrant of arrest had

been illegally obtained by use of hearsay evidence and without probable cause (R. 5-7, 28-30, 134). The motion was denied (R. 30), the arrest being sustained as having been made upon probable cause (R. 139-143).

On the issue of probable cause to arrest without a warrant (R. 73), agent Ralston testified that, on the day of the arrest, at about 2:00 p.m. he was called to his Tacoma office to receive a telephone communication from a named Seattle F.B.I. agent (R. 75-76, 64). Ralston was told at this time that petitioner Weise, a known dealer in obscene photographs,[1] had left Los Angeles, California, two days earlier together with a man identified later as French, driving north in a 1955 Buick. Ralston was told that Weise had sold obscene photographs in Seattle a few months before and was investigated at that time (R. 66, 77). Weise had reportedly described the load in his car as "the real stuff"—"not just strippers". A detailed description of the car was given Ralston. He was also told that since the time of leaving Los Angeles, the car had been under the continued surveillance of fellow F.B.I. agents, and that packages were taken from it into business establishments in Oakland, San Francisco, and Sacramento reputedly dealing with obscene photographs and literature (R. 76-77). The car was reported to be then in Oregon.[2]

At 8:30 p.m., agent Ralston received another communication that the Buick car under observation was crossing a bridge into Washington from Oregon (R.

[1] Both petitioners had in fact records of arrest and conviction for activities involving obscene materials (R. 154).

[2] At trial, an F.B.I. agent of Portland testified as to similar stops made in Oregon and as to the car's entry into Washington (R. 33-38).

77). He set out with other area agents under his command in two official cars to take up surveillance of the Buick (R. 65). A few miles south of Olympia at about 10:00 p.m., he spotted the Buick and its pursuing cars (R. 66-67). He observed that petitioners sat in the front seat of the Buick, that brown cardboard boxes filled the rear interior almost to the level of the windows, and that the body of the Buick was low on the rear axle as if heavily loaded (R. 67-68, 77-78). At about the same time he received a radio communication that a complaint had been filed in Seattle, Washington, and a warrant of arrest issued there for petitioners (R. 78).[3]

Ralston joined the convoy of Bureau cars pursuing the Buick northward, meanwhile receiving periodic radio communications (R. 68, 69, 70). At Tacoma, Washington, he and the other agents in the convoy, acting under his orders, arrested petitioners and seized the pornographic materials (R. 70-71, 80, 82, 119, *et seq.*).

[3] At trial the government did not rely upon the warrant of arrest (although it was filed with the court (R. 135)) but merely offered evidence that Ralston was informed of its issuance just prior to the arrest as bearing on the issue of probable cause (R. 78). Petitioners, in renewing their motion to suppress at the conclusion of the government's testimony, asked for the admission into evidence of the complaint and the warrant, attacking their validity (R. 135, 19, 21). Neither the trial court nor the court below ruled specifically upon the validity of the warrant but rather concluded that the arrest of petitioners was properly made upon probable cause without a warrant and that a valid search was made incident to that arrest.

ARGUMENT

The sole issue here is whether there was probable cause to arrest petitioners under the circumstances of this case.[4] Petitioners contend that the officers could have arrested them on probable cause only after a determination to a certainty that every essential element of the statutory crime existed. In effect, they argue that, to establish probable cause, the degree and character of the evidence must be such as would be required to convict at trial. This is not in accord with established law.

This Court exhaustively treated the issue of probable cause in *Brinegar* v. *United States*, 338 U.S. 160 (following *Carroll* v. *United States*, 267 U.S. 132), where it pointed out that the existence of probable cause could not be measured by the application of technical evidential standards, particularly in cases involving moving vehicles, but must be determined through factual and practical considerations of everyday life on which reasonable and prudent men act. 338 U.S. 174-175. The facts of the instant case, we believe, provide an even stronger basis for a finding of probable cause than those in *Brinegar*.

Like *Brinegar* (and *Carroll*) the search here was of a moving vehicle on a public highway by federal officers charged with enforcing a statute prohibiting the trans-

[4] Petitioners persist in attacking the validity of the warrant of arrest, an issue which neither court below found necessary to consider in a determination of this cause. The record is clear that the government did not rely upon the warrant to justify the arrest of petitioners by an officer not in possession of it (see Rule 4(c)(3) of the Federal Rules of Criminal Procedure), but introduced testimony regarding its issuance solely as one of many factors bearing upon the issue of probable cause to arrest without a warrant (R. 73, 78).

portation (under certain conditions) of specified goods. As in those cases, the officers here knew that the car's driver had lately dealt with such goods. They not only knew that the identified car was stopping at, and proceeding in the direction of, probable markets for the prohibited goods but they had reliable specific information that it was loaded with the goods.

More specifically, here the officer ordering the arrest knew that the car, described to him in detail, was being driven by petitioners northward, loaded with what was believed to be pornographic material. The officer knew that petitioners had stopped many times en route to unload boxes at establishments reported to deal in pornography. He knew that the car had entered the State of Washington where, some few months earlier, its owner had sold obscene photographs. He personally observed that the car was heavily loaded with cardboard boxes. Without regard to any knowledge that he had respective to the issuance of a warrant, he had sufficient "reasonable grounds" for believing that a felony was being committed.

Petitioners argue (Pet. 14), again *contra* to the *Brinegar* decision, that agent Ralston could act only upon what he "saw through his own sensory organs" and not on the facts communicated to him. In *Brinegar*, the knowledge constituting probable cause was derived from personal observation and experience as well as facts of common knowledge and hearsay in the nature of general reputation. *Reliability* of the information was made the determinative factor. The Court, citing *Carroll*, *supra*, set out a definition of probable cause (338 U.S. at 175-176):

> Probable cause exists where "the facts and circumstances within their [the officers'] knowledge

> and *of which they had reasonably trustworthy information* [are] sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense has been or is being committed. [Emphasis added.]

Here, even assuming that information gained by Ralston through an agency official report coming into his base of operation could for these purposes be termed hearsay, it could certainly not be termed unreliable. It was not based on surmise, or rumor, or evidence of general reputation, but upon an official investigation made after a report was received of Weise's previous activity in the state. It was channeled to Ralston through named agents and it was corroborated by a coastal network of official surveillance and the personal observation of Ralston and that of the other arresting agents.[5] It was information that would furnish reasonable grounds for an F.B.I. agent or any man of reasonable caution to believe that a crime was being committed. To require that all information providing the basis for probable cause come through one arresting agent's personal senses would preclude many modern methods of law enforcement.

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[5] Except for the one statement in the report that petitioner Weise had told someone in California that he had the "real stuff", it was not anonymous in any way, and the record before this Court does not show that petitioners requested the identity of the informer in this respect.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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